TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 180.

THE TEXAS & PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

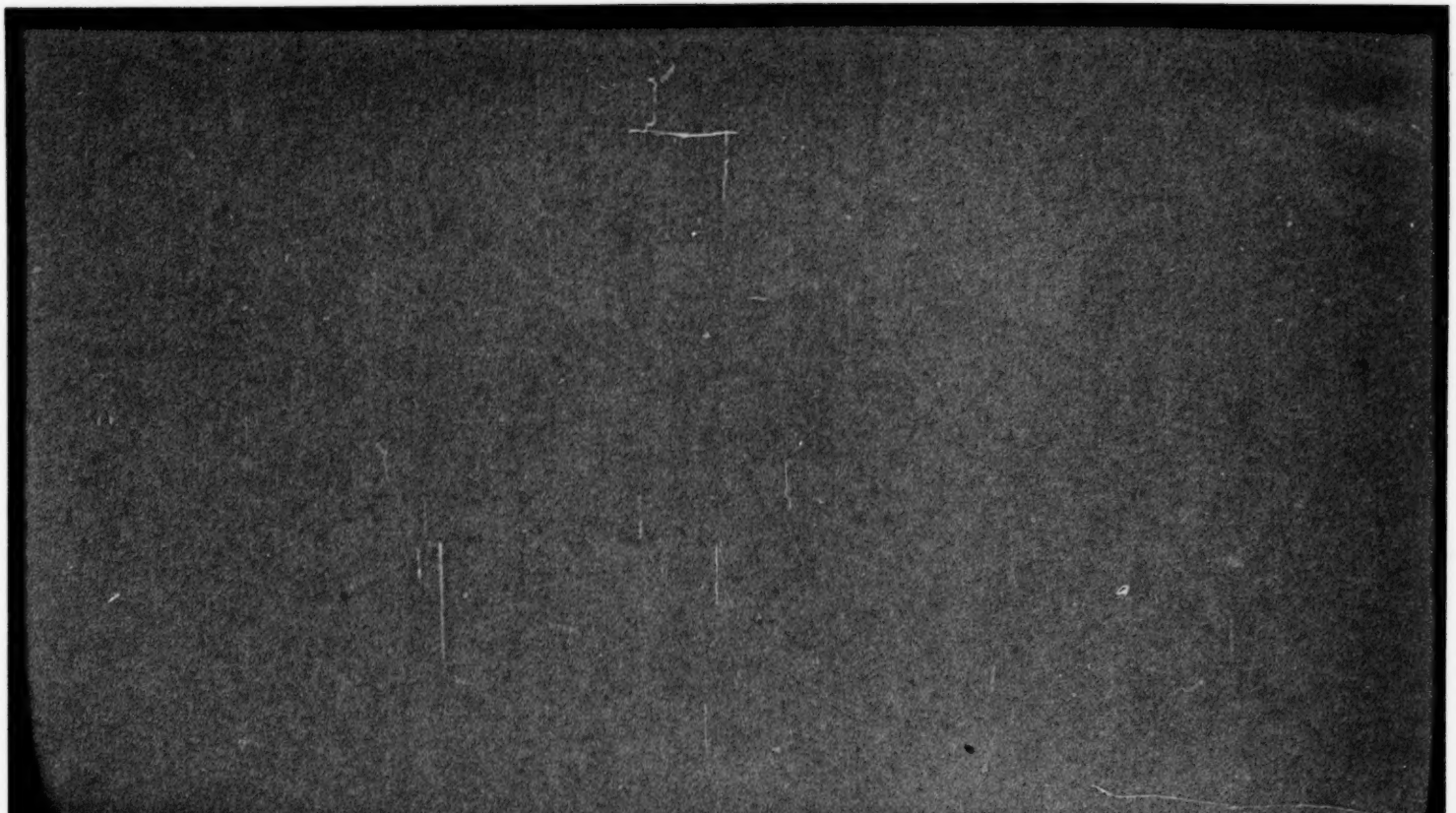
vs.

AMERICAN TIE & TIMBER COMPANY, LTD.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED FEBRUARY 2, 1914.

(23,040)



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a TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2163.

THE TEXAS & PACIFIC RAILWAY CO., Plaintiff in Error,
versus
AMERICAN TIE & TIMBER CO., LTD., Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Texas.

[Original record filed December 27, 1910.]

U. S. Circuit Court of Appeals. Filed Apr. 22, 1911. Charles H. Ledmum, Clerk.

b UNITED STATES OF AMERICA,
Fifth Judicial Circuit:

Pleas and proceedings had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on the third Monday of November, 1911, before the Honorable Don A. Pardee and the Honorable David D. Shelby, Circuit Judges, and the Honorable William I. Grubb, District Judge.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
versus
AMERICAN TIE & TIMBER COMPANY, LTD., Defendant in Error.

Be it remembered, that heretofore, to-wit: on the 27th day of December, 1910, a transcript of the record of the above styled cause from the Circuit Court of the United States for the Northern District of Texas, was filed in the office of the Clerk of said United States Circuit Court of Appeals for the Fifth Circuit, in the words and figures following, to-wit:

1 *Caption.*

Be it remembered, That at a term of the Circuit Court of the United States in the Fifth Circuit thereof, and in and for the Northern District of Texas, at Dallas, Texas, begun and holden at Dallas, Texas, on the 2nd day of May, A. D. 1910, and which term adjourned on the 12th day of July, A. D. 1910, the Honorable Edward R. Meek, United States District Judge for the Northern District of Texas, presiding, the following proceedings were had and the following cause came on for trial and was tried, to-wit:

No. 2470.

AMERICAN TIE AND TIMBER COMPANY, LIMITED,
versus
THE TEXAS AND PACIFIC RAILWAY COMPANY.

2 *Plaintiff's Third Amended Original Petition.*

Filed 2nd day of May, 1910.

In the Circuit Court of the United States for the Northern District of Texas, at Dallas. May Term, A. D. 1910.

Consolidated No. 2470.

AMERICAN TIE & TIMBER COMPANY, LIMITED, Plaintiff,
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY, et al., Defendants.

Third Amended Original Petition Against The Texas & Pacific Ry. Co.

To the Honorable Judges of said Court:

American Tie & Timber Company, Limited, plaintiff, complaining of the Texas & Pacific Railway Company, defendant, leave of the Court being had so to do, files this, its third amended original petition, amending and in lieu of its second amended original petition, herein heretofore filed on the 21st day of January, 1909, and respectfully represents:

I.

That the plaintiff is a private corporation organized under the laws of the State of Louisiana, having its principal place of business at Shreveport, in the State of Louisiana, and is a citizen of the State of Louisiana; and that the defendant is a private corporation organized under the laws of the United States, having its principal place of business and domicile at Dallas, in Dallas County, and in the Northern District of Texas, and is an inhabitant of the Northern District of Texas, and resides in Dallas County, Texas.

II.

That heretofore, to-wit, on the 23rd day of May, 1901, the defendant issued and filed with the Interstate Commerce Commission of the United States its joint through lumber tariff, T. & P. No. 8500-H, applying on lumber, all kinds (except Walnut and Cherry), lath and shingles and articles taking same rates from points on the
3 Texas & Pacific Railway Co. to points in Kansas, by and through and under which said lumber tariff the said defendant established, promulgated and put into effect a rate between

points on the line of the defendant in the States of Arkansas and Louisiana and the town of Linwood, in the State of Kansas, of 24 cents per one hundred pounds on, amongst other things, oak lumber; that said rate has been continuously, from the date of its promulgation and filing with the United States Interstate Commerce Commission, as aforesaid, in full force and effect, and is now in full force and effect, and during the whole of said time has been, and is now being used by the defendant, which is a common carrier, transacting the business of interstate commerce between all of the points mentioned in said tariff.

III.

That heretofore, to-wit, on the 23rd day of July, 1907, the plaintiff entered into a certain written contract of that date with the Union Pacific Railway Company, acting through its purchasing agent, J. W. Griffith, thereunto duly authorized, whereby the plaintiff contracted with the said Union Pacific Railway Company, to deliver to said Union Pacific Railroad Company, at Linwood, Kansas, one hundred and fifty thousand (150,000) white oak, burr oak and post oak crossties, not less than eight feet, nor more than eight feet one inch in length, with ends sawed or cut square, all bark taken off, hewn or sawed on two parallel lines to straight, smooth surfaces or sides, not less than six inches between the parallel faces, and each face to be not less than eight inches wide at any point; and said plaintiff further by said contract agreed to commence delivery of said crossties on or before October 1, 1907, and continue at the rate of fifteen thousand (15,000) ties per month until delivery should be completed, said ties to be delivered free on board cars at Linwood, Kansas, and by said contract the said Union Pacific Railroad Company agreed, promised and became obligated to pay to the plaintiff on delivery of said ties at Linwood, Kansas, the price of eighty-six (86) cents for each and every of said ties. That said contract by its terms is based on the said freight rate of 24 cents per hundredweight, and contains other provisions and stipulations not necessary to be here more specifically set forth, but a true copy of said contract is hereto attached, marked Exhibit "A" and made a part of this petition, and prayed to be considered with the same effect as if set forth verbatim herein.

4

IV.

That after the execution of the said contract between the plaintiff and the Union Pacific Railroad Company, the plaintiff in order to fulfill its obligations under said contract, immediately commenced the accumulation of crossties, such as are described in said contract and such as are hereinbefore described, and between the date of said contract and the 30th day of November, A. D. 1907, the plaintiff accumulated and contracted for the delivery at stations along the line of the defendant in the States of Arkansas and Louisiana, for the purpose of shipping under said contract, forty-four thousand five hundred and forty-one (44,541) crossties of the description here-

inbefore mentioned, which said crossties were made of oak and were sawed, riven and hewn in conformity to the terms of said contract, and were distributed for shipment along the line of the defendant's line of railway in Louisiana at the following points, each of which is a place for the reception of such character of freight by the defendant, to-wit:

Fouke, Ark.	11836
Chopin, La.	839
Marthaville, La.	8226
Powhattan	3581
Whitlock Spur, La.	2033
Caldwell's Spur, La.	1638
Bridge's Mill, La.	710
Derry, La.	5948
Waller's Spur, La.	493
Sodus, La.	1211
Robelin, La.	885
Provencal, La.	1127
S. & G. Spur, La.	1457
Hayti, La.	1719
Grand Bayou, La.	975
Thigpen's Spur, La.	710
Cen. Lbr. Co. Switch	1153
Mansfield, La.	.....
Total	44541

That when the accumulation of ties as aforesaid on the line of defendant's railway commenced, and that on or about October 10, 1907, the plaintiff requested the defendant to furnish cars for the loading of crossties at its points aforesaid for shipment to Linwood, Kansas, and the defendant, in pursuance of such request, did furnish to the plaintiff three cars for such purpose, which said three cars were loaded by the defendant with crossties and shipped to the Union Pacific Railroad Company at Linwood, Kansas, over the defendant's line of railway, and for these shipments of said three cars defendant issued and delivered to the plaintiff bills of lading covering said shipments from the points of origin aforesaid to Linwood, Kansas, at the rate of 24 cents per one hundred pounds shown by said tariff hereinbefore mentioned; that the crossties so shipped are not included in the aforesaid number of forty-four thousand, five hundred and forty-one crossties, but were in addition thereto. That afterwards and on, to-wit, the 26th day of November, A. D. 1907, the defendant, acting through its vice president and general manager, L. S. Thorne, was applied to by the plaintiff for cars into which to load the said forty-four thousand, five hundred and forty-one (44,541) ties aforesaid for shipment from the points in Arkansas and Louisiana on the defendant's line, where said ties were located, as aforesaid, to Linwood, Kansas, to be deliv-

ered to said Union Pacific Railroad Company, under said contract, of which the defendant had been duly notified, but the said defendant, acting through said L. S. Thorne, then and there refused to furnish cars for the loading of said crossties, or any part thereof, and refused to permit said crossties to be shipped over the defendant's line of railway, and instructed the agents of the defendant to refuse to receive the said crossties, or any part thereof for shipment, or to ship the same. That thereupon, and by occasion of the failure of the defendant to furnish cars for the loading of, and to receive for shipment said crossties, the plaintiff was prevented and wholly disabled from delivering said crossties at Linwood, Kansas, to Union Pacific Railway Company under said contract, and by occasion of said acts of the defendant the plaintiff has been disabled and prevented from receiving from said Union Pacific Railway Company the sum of eighty-six (86) cents for each one of said 44,541 crossties listed and enumerated hereinbefore.

V.

The plaintiff further represents that as to each and every one of said forty-four thousand, five hundred and forty-one (44,541) crossties the defendant, after being requested to do so by the plaintiff, refused to furnish cars for their transportation to Linwood, Kansas, on the ground and for the reason as stated by the defendant
6 to the plaintiff, that said lumber rate of 24 cents was not applicable thereto, and that there were no rates over defendant's lines to Linwood, Kansas, on oak crossties; and the defendant not only failed and refused to furnish cars for the shipment of said ties upon the demand of plaintiff, which was duly made, but refused to recognize, or use, or authorize its agents to recognize or use any rate whatever as a basis for the shipment of said ties to Linwood, Kansas. Plaintiff further represents that had it been permitted by the defendant to ship over the defendant's line of railway the said ties at the rate of 24 cents per hundred pounds to Linwood, Kansas, plaintiff would have received from the said Union Pacific Railroad Company for said forty-four thousand five hundred and forty-one (44,541) ties the sum of thirty-eight thousand, three hundred and five dollars and twenty-six cents ($38,305.26), and the total freight thereon would have amounted to sixteen thousand, thirty-four dollars and seventy-six cents ($16,034.76). That in addition to the freight the plaintiff would have been compelled to pay for the loading of said ties the sum of eight hundred and ninety dollars and eighty-two cents ($890.82), and that a large portion of said crossties on November 25, 1907, were in place along the defendant's line of railway, and the remainder, which plaintiff had so contracted for, were and for more than one year remained in place along the defendant's line of railway ready for loading and shipment; that on account of the failure and refusal of the defendant to receive and transport said ties at said 24 cents rate, or at any reasonable rate, plaintiff was unable to ship same out on said contract with said Union Pacific Railroad, or otherwise dispose of said ties at a fair and

reasonable price, or at any price to justify their movement, until during the summer of 1909, when plaintiff sold said ties for the sum of ten thousand, eight hundred and seven and 01/100 dollars ($10,807.01), which was a fair and reasonable price and the reasonable market value of said ties in the condition they were in and the rates then in force over the line of defendant's railway at which the defendant would transport the same; that by reason of the refusal of the defendant to receive and transport said ties as aforesaid, plaintiff was compelled to leave same stacked along the line of defendant's railway, exposed to the weather and elements, and that said ties were greatly depreciated in value, and many of them became and are utterly worthless and unsalable. And plaintiff represents that the difference between the then and present value of said ties and the price it would have realized therefrom under its contract,
7 less the cost of delivery at Linwood, Kansas, is the sum of ten thousand five hundred and seventy-two and 67/100 dollars ($10,572.67).

VI.

Plaintiff further represents that under and by virtue of the Interstate Commerce Act of the United States it is, and was the duty of the defendant, which was and is, a common carrier within the definition of said law, engaged in interstate traffic to have provided and furnished upon the reasonable request of the plaintiff, cars for the loading and carrying of said crossties, and all of them, and it was, and it is also the duty of said defendant to transport said ties at the said published rate of 24 cents, as shown by its said tariff, which said tariff was and is applicable to said oak crossties which were at all of the times hereinbefore mentioned, and still are, oak lumber. And plaintiff further represents that under said Interstate Commerce Act it was and is unlawful for the defendant to make, or give any undue or unreasonable preference or advantage to any particular locality, or any particular description of traffic in any respect whatsoever, or to subject the same to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and the plaintiff alleges that the defendant by its acts and omissions aforesaid did discriminate, and intended to discriminate unduly and unlawfully and unreasonably against oak ties in the several localities where plaintiff's ties were situated as aforesaid, for the purpose of preventing the movement of said ties to points off the defendant's line of railway, seeking thereby to compel the plaintiff, as the owner of said ties, to sell the same directly or indirectly to the defendant, which is a large purchaser of that commodity. And the plaintiff further represents that the defendant did by the acts and omissions aforesaid unduly and unreasonably prejudice and discriminate against the locality in which such crossties were produced and the crossties themselves as traffic, and plaintiff represents that the failure of the defendant to move such traffic on its published rate, as aforesaid, of 24 cents, was an unreasonable prejudice and disadvantage to the plaintiff, and to said traffic, inuring directly to the benefit of the defendant as a consumer and purchaser of said crossties.

VII.

8 Plaintiff further represents that but for the unlawful acts of the defendant, as aforesaid, plaintiff would have shipped to the said Union Pacific Railroad Company in pursuance of the contract aforesaid, over the line of defendant's railroad fifty-eight thousand nine hundred and seventy (58,970) of the aforesaid sixty thousand (60,000) ties, on which it would have made a profit of 13.27 cents for No. 1 and 18.80 cents for No. 2, per tie, or the aggregate sum of seven thousand, nine hundred ninety-one and 22/100 dollars ($7,991.22). That the defendant by its aforesaid unlawful acts, has prevented the performance of said contract, and has rendered plaintiff powerless to perform the same; that as appears from the face of said contract, time is of the essence thereof, plaintiff agreed to deliver ties at the rate of fifteen thousand (15,000) per month, that by reason of the inability of plaintiff to deliver ties to the said Union Pacific Railroad Company at said rate, said Union Pacific Railroad Company has elected to and has treated said contract as terminated. Plaintiff further avers that but for the unlawful interference of defendant, as aforesaid, said contract would have been performed by the plaintiff and the plaintiff would have reaped a profit therefrom of the sum of seven thousand nine hundred and ninety-one and 22/100 ($7,991.22) dollars, and that by reason of the premises defendant has also become liable therefor.

VIII.

Plaintiff further represents that by reason of the premises and of the unlawful acts and omission of the defendant hereinbefore set out, the plaintiff has become entitled, under the provisions of said Interstate Commerce Act of the United States, to damages in the sum of ten thousand five hundred and seventy-two and 67/100 ($10,572.67) dollars, resulting to it by reason of the said forty-four thousand, five hundred and forty-one (44,541) crossties as more particularly set forth in paragraph 5 hereof, and the further sum of seven thousand nine hundred and ninety-one and 22/100 ($7,991.22) dollars, resulting to it as a loss of profits on the aforesaid fifty-eight thousand nine hundred and seventy (58,970) crossties, more particularly set forth in paragraph 7 hereof, which said sums have been by the plaintiff demanded from the defendant, but the defendant has wholly failed and refused to pay the same or any part thereof, and still fails and refuses to pay the same, to plaintiff's great damage in the sum of eighteen thousand five hundred and sixty-three dollars and eighty-nine cents ($18,563.89), with interest thereon at the legal rate from the 26th of November, A. D. 1907.

9 ## IX.

Plaintiff further represents that it has been compelled to expend and has expended the sum of thirty-nine hundred dollars ($3900.00) for services and expenses in looking after and protecting the aforesaid ties, so placed at the aforesaid stations on defendant's line of railway,

and so tendered to the defendant for shipment as aforesaid, which sum is the reasonable value of said service and expenses; and further that it has suffered damage in the full sum of two thousand seventy-four and 89/100 dollars ($2,074.89) legal interest on the amount of money invested in and the cost of said ties during the time the [they] were so placed ready for shipment and could not be sold or disposed of on account of the failure and refusal of the defendant to receive and transport said ties; for all of which the defendant is liable.

X.

Plaintiff now avers that it was organized for the purpose of conducting the business of buying, manufacturing, shipping and selling white oak, burr oak, post oak and other railroad ties to points without and beyond the territory of the defendant. That, but for the unlawful acts of the defendant, as herein set forth, plaintiff would have obtained numerous and other profitable contracts similar to the one with the Union Pacific Railroad Company, and that in the conduct of its legitimate business it would have reaped but for the unlawful acts of the defendant a profit of at least twenty-five thousand ($25,000.00) dollars per annum, for a period of five years, and that the business in which plaintiff was lawfully engaged was reasonably worth, but for the unlawful interference of the defendant, the sum of one hundred thousand ($100,000.00) dollars. That defendant's unlawful interference has wholly and totally destroyed the business of the plaintiff, and has incapacitated it both from performing the contracts into which it has entered, and from entering into other similar profitable contracts; and plaintiff avers that the defendant is liable to it for the damage thus sustained.

XII.

Plaintiff avers that the unlawful discrimination of the defendant herein complained of was wilful, wanton and malicious, in that the defendant wilfully refused to accept the shipments tendered to it by the plaintiff, as aforesaid, or any other similar shipments, for the sole reason that the defendant wilfully intended that no white oak, burr oak, post oak or other railroad ties should be by the plaintiff sold to any railroad or railroads whatsoever operating beyond or without the limits of the territory traversed by the defendant's line of railway. That defendant designedly, knowingly, wilfully and maliciously refused the aforesaid shipments or any other shipments of such crossties from the plaintiff for the unlawful purpose of preventing the plaintiff from selling such crossties to any railroad or railroads other than the defendant. That such wilful, malicious and vexatious discrimination was wholly unjustifiable and was intended to and did prevent the plaintiff from conducting its legit-mate business of dealing in such crossties, and of selling the same in the open market to the various other railways of the United States traversing territory remote from that traversed by the defendant's line of railway, and plaintiff therefore avers that the

defendant is liable to it in the sum of twenty-five thousand ($25,000.00) dollars as exemplary damages.

XIII.

Plaintiff further represents that by occasion of the acts and doings aforesaid of the defendant, the defendant has become further liable under the provisions of the Interstate Commerce Act to pay to the plaintiff a reasonable attorney's fee for the institution and prosecution of this suit, which plaintiff a-leges [alleges] to be the sum of, to-wit, five thousand dollars ($5,000.00).

Wherefore, premises considered, plaintiff prays (the defendant having been heretofore duly and legally cited to appear herein and having answered herein), that upon a trial hereof plaintiff have judgment for its said damages, interest, attorney's fees, and all costs of suit, and for such other and further relief in the premises as it may be entitled to, and as in duty bound plaintiff will ever pray, etc.

RODGERS & DOROUGH,
W. H. CLARK,
Attorneys for Plaintiff.

11 EXHIBIT "A."

Proposal to Furnish Crossties.

The undersigned proposes, and if proposal is accepted, agrees to deliver to the Union Pacific Railroad Company, free from all liens, claims and charges of any character whatsoever, except as hereinafter named, one hundred and fifty thousand (150,000) white oak crossties, per the following specifications:

Specifications.

Said crossties must be manufactured from straight, sound, live timber, free from cracks, shakes, rot and rotten knots. They must be not less than eight feet (8) nor more than eight feet (8) and one (1) inch in length, with ends sawed or cut square; all bark taken off. Hewn or sawed on two parallel sides to straight, smoth surface on sides. They must be not less than six inches (6) thick between parallel faces and each face must not be less than eight inches (8) wide at every point. The following varieties of timber will be accepted: White oak, burr oak and post oak.

All ties to be subject to inspection and approval of an agent of the Union Pacific Railroad Company appointed for that purpose, who will not accept any ties that fail to comply strictly with the above specifications, except that a small number of second-class ties, not exceeding five per cent (5%) will be accepted at a price not exceeding two-thirds (⅔) of the price of first-class ties after deduction of freight charges. Inspection to be made at point of shipment.

Delivery of said ties to be commenced on or before October 1, 1907, and continued at the rate of fifteen thousand (15,000) ties per month until deliveries are completed.

Said ties are to be delivered to Union Pacific Railroad free on board cars at Linwood, Kansas, for the price of eighty-six cents (86¢) each, based on the present freight rate of twenty-four cents (24 cts.) per cwt.

Should there be an increase in the freight rate above named, of twenty-four cents (24) per cwt. during the life of this contract, the railroad company is to assume such additional cost of freight, or may at its option, cancel contract for any undelivered portion of same, should it not be willing to pay such additional freight charges, should there be a decrease in the freight rate during the life of this contract, the railroad company shall receive a corresponding
12 reduction in the price of all ties delivered after said reduced rates take effect

It is agreed that ten per cent (10%) of the purchase price after deduction of freight shall be retained by (the) Union Pacific Railroad Company until completion of contract.

Payments for ties delivered in any one month to be made during succeeding month, the Union Pacific Railroad Company to pay freight charges accruing on ties from points of shipment to Linwood, Kansas, and deduct amount of same from the bills of the American Tie & Timber Company, Ltd., for said ties. On completion of the contract in accordance with its terms, the ten per cent (10%) retained shall be paid by the Union Pacific Railroad Company to us.

In case we should default in the delivery of the full quantity of ties herein contracted for, and such default be occasioned by negligence, carelessness or unbusinesslike action upon our part, or for any other reasons outside of those over which we have no control, then the ten per cent (10%) of contract price retained shall be applied to the Union Pacific Railroad Company towards paying any damages suffered by it by reason of non-fulfillment of said contract.

In witness whereof, the parties hereto have executed this agreement in duplicate, this 23d day of July, 1907.

AMERICAN TIE & TIMBER COMPANY, LTD.,
Per D. G. PETTY, *President*.

Accepted by

UNION PACIFIC RAILROAD COMPANY,
Per J. W. GRIFFITH,
Purchasing Agent.

Indorsed: Consolidated No. 2470. American Tie & Timber Co., Ltd., vs. Texas & Pacific Ry. Co., et al. 3rd Amended Original Petition vs. T. & P. Ry. Co. Filed 2 day of May, 1910. Louis C. Maynard, Clerk.

13 *Defendant's Second Amended Original Answer.*

Filed May 5th, 1910.

In the Circuit Court of the United States for the Northern District of Texas, at Dallas, January Term, 1908.

No. 2470.

AMERICAN TIE & TIMBER COMPANY, Plaintiff,
vs.
THE TEXAS & PACIFIC RY. COMPANY, Defendant.

Now comes The Texas & Pacific Ry. Co., by its attorneys, and leave of the Court being first had and obtained, files this its second amended original answer, in lieu of its first amended original answer, filed herein on the 27th day of May, 1908, and says:

(1) It excepts to the plaintiff's petition and says that the same is insufficient in law and presents no cause of action against this defendant, and of this it prays the judgment of the Court.

(2) Defendant specially excepts to all that portion of the plaintiff's petition wherein it is alleged that on or about October 10th, 1907, plaintiff requested, and defendant furnished, cars for loading crossties from the points mentioned in plaintiff's petition to Linwood, Kansas, on which cars it is alleged that defendant issued and delivered to plaintiff bills of lading, charging the rate of twenty-four (24¢) cents per hundred (100) pounds, for the reason that the plaintiff disclaims any cause of action by reason of said facts, and if the defendant had in fact so furnished said cars at said rate, unless the same was the legal rate applicable to said shipments the alleged action of the defendant in so furnishing said cars at said rate would have no bearing whatever upon the plaintiff's cause of action and would not in any manner compel the defendant to furnish other cars at the same rate, or in any manner depart from a strict observance of the law governing its action in the matter of imposing the correct charges on the shipment offered by the plaintiff, if there was a rate on said commodity, nor would said facts alleged require it to transport, or be an excuse to it for transporting, the commodity offered by the plaintiff for shipment, unless, and until, it had

14 in existence a rate under which said commodity could lawfully move, and of this defendant prays the judgment of the Court.

(3) Defendant further specially excepts to the allegations in the plaintiff's petition relative to the furnishing of the said three cars, for the reason that said petition does not specificially set out the time and place where said cars are alleged to have been furnished, or give the name of the person, or official, alleged to have acted for the defendant in the furnishing of said cars and in the execution of said bills of lading, at the rate alleged, and without more particular allegation the defendant is unable to locate said shipments and investigate the cir-

cumstances connected therewith, and of this it prays the judgment of the Court.

(4) Defendant excepts to all that portion of the plaintiff's petition wherein it seeks to recover of this defendant the profits that it expected to receive from the Union Pacific Railroad Company by reason of the contract alleged to have been entered into by and between the plaintiff and the Union Pacific Railroad Company, acting by and through J. W. Griffith, purchasing agent for said company, because said petition merely alleges that the defendant was duly notified of said contract but does not state at what time and place and to what person or official connected with the defendant company this contract was made known, and does not state that the defendant, or any particular officer or person whose knowledge would be binding upon it, was in advance of application for cars and rates, or at any time before the institution of this suit, or the filing of the plaintiff's first amended original petition, notified of the particular terms of said contract, so that the damages, if any, from the failure of plaintiff to carry same out or from any action or default of this defendant would be reasonably within contemplation of the parties at the time plaintiff alleges that the demand for cars and rates were made by it and were refused by this defendant, and said profits so claimed are vague, indefinite and speculative and constitute no cause of action or rightful claim against this defendant, as stated in the plaintiff's petition; all of which defendant respectfully submits to the Court and on same seeks judgment.

(5) Defendant specially excepts to all that portion of the plaintiff's petition wherein it seeks to recover of defendant the sum of three thousand nine hundred dollars, alleged to have been
15 expended by it in looking after and protecting the cross-ties alleged by it to have been placed at points on the line of the defendant's railway and to have been tendered for shipment to defendant, and to the claim for interest on money invested, because said petition fails to state any fact which entitled the plaintiff to look to the defendant to reimburse for it such sums alleged to have been so expended or lost by it, and of this it prays the judgment of the Court.

(6) Defendant specially excepts to all of plaintiff's petition contained in paragraphs 7, 8, 10 and 12, for the reason that said portions of the plaintiff's petition fail to state a cause of action, or any part of a cause of action, against this defendant, but seeks to recover damages that are indefinite, remote and speculative, and depend on future events and conditions that are not stated, and in the nature of things could not be stated with any foundation as to certainty; that the continuances on which said damages might or might not arise are not so fixed as to make such damages as claimed either certain or probable, or to furnish a reasonable rule for the guidance of this Court, or a jury, and such facts as are alleged relative to future profits and damages on account of defendant's acts, as set out in said paragraphs 7, 8, 10 and 12, inclusive are in all things insufficient to allow plaintiff to any recovery whatever of this defendant, and of this it prays the judgment of the Court.

(7) Defendant specially excepts to all that portion of the plaintiff's petition contained in paragraph twelve (12), wherein the plaintiff seeks to recover of this defendant the sum of five thousand ($5,000.00) dollars as an attorney's fee, and says that the facts therein stated and stated in other portions of plaintiff's petition, do not entitle*d* [entitle] the plaintiff to the recovery of attorney's fees, and the allegations in respect to same are insufficient and of this it prays the judgment of the Court.

(8) Defendant denies all and singular the allegations in the plaintiff's petition contained, and demanding strict proof of same, puts itself upon the country.

(9) Specially answering herein, this defendant says that at no time when application has been made to it by the plaintiff herein had it in effect a rate on oak ties in carload lots between the points on its line in Louisiana and interstate points, including Linwood,
16 Kansas, under which it could have lawfully accepted and moved said ties. Defendant respectfully shows to the Court that its joint through lumber tariff, T. & P. No. 8500-H, quoting a rate of twenty-four (24) cents per hundred (100) pounds on lumber and various articles taking said lumber rate, did not include or cover the charge for transportation of oak railway crossties, which is a separate and distinct and well recognized freight commodity, as to which at the times mentioned in this plaintiff's petition, the defendant did not have any established and filed tariff under the terms of the Interstate Commerce Act, or the laws of the United States relating to carrying and charges by railway companies of interstate freight, under which it could lawfully have accepted and carried the shipments of crossties alleged by the plaintiff to have been offered for shipment. This defendant specially denies that its failure to have in at said time such a rate was a discrimination against the said commodity, or against any locality, or against the plaintiff herein or any person, but that oak cross ties *was* a commodity that had not previously been offered to this defendant from Louisiana points to interstate points on its line and connections so that the establishment of a rate on same was advisable or incumbent in any manner upon this defendant, and when such shipments were offered by the plaintiff, this defendant at once promptly explained that at said time it did not have in a rate under which it could lawfully move said freight, but that if it desired it would as soon as requisite legal notice could be given, put in such rates as would enable it to carry said crossties so offered by the plaintiff herein.

Defendant respectfully shows to the Court that the first notice it had that the plaintiff desired to make shipments of oak crossties from Louisiana to Linwood, Kansas, was on or about the 24th day of September, when it received from J. J. Mitchell, manager of the American Tie & Timber Company, a letter addressed to its general freight agent, asking for advice as to defendant's rate on oak railway cross ties from various points in Louisiana, to various interstate points, including Linwood, Kansas. Defendant at once caused its commercial agent at Shreveport, viz., H. L. Hinton, to call upon plaintiff's said manager and explain to him that at that time defend-

ant had no tariff of rates on oak cross ties from and to the points mentioned in his communication, but that if given sufficient notice in advance to arrange legal publication, defendant would probably be able to establish a rate of fifty (50) cts. per hundred pounds, between said Louisiana points on its line and Linwood, Kansas.

17 This communication was made in person, and at said time the manager of plaintiff requested that the information be put in writing, stating that his company, the plaintiff herein, was not itself interested in the rate and that he was only seeking the information for the benefit of the Union Pacific Railroad Company, and, although this defendant at said time, through its said representative, offered to take steps to put in said rate of fifty cents per hundredweight, the plaintiff herein through its said manager, J. J. Marshall, disclaimed any further interest in the matter and did not further communicate to this defendant a desire to have rates established for the movement of said oak railway crossties, between said points. Later, however, on, to-wit, October 7th, 1907, this defendant, through its general freight agent, received a communication from the Interstate Commerce Commission inclosing a letter of complaint, under date of September 30th, 1907, which had been filed with said Interstate Commerce Commission, by the American Tie & Timber Company, acting through its said manager, J. J. Marshall, the substance of which complaint was that the rate of fifty cents per hundredweight, which defendant had offered to put in was unsatisfactory to the plaintiff and was submitted, together with a statement that defendant had in effect a joint through lumber tariff, hereinbefore referred to, complaining that by comparison with said tariff the product offered by the plaintiff for shipment was being subjected to an unjust discrimination. Defendant respectfully shows to the Court that from the receipt of said letter from the Interstate Commerce Commission, inclosing a copy of said complaint by the plaintiff, there ensued an exchange of correspondence between the plaintiff and the Interstate Commerce Commission and this defendant, in which said Interstate Commerce Commission sought in an informal way to adjust the question of what rates should apply on oak crossties, and this correspondence was in progress on the 25th day of November, at which time this defendant, through its vice president and general manager, L. S. Thorne, received from the plaintiff herein a telegram requesting that cars be placed at the various points mentioned in the plaintiff's petition for the loading of wood railway crossties from said points, consigned to the Union Pacific Railroad Company at Linwood, Kansas, and stating that the ties were sold for eighty-six cents each, delivered on defendant's published lumber tariff now in effect, and that the ties to be loaded on said cars represented a profit to plaintiff of seventeen cents each. Defendant, through its said vice president and general manager, on said rate replied to the plaintiff by wire, stating if the ship-

18 ments were oak ties, plaintiff was thereby notified that defendant had no interstate rates in effect at that time on oak ties and that plaintiff must not load equipment until such rates were put into effect; also advising the plaintiff therein that defendant had applied

to the Interstate Commerce Commission for authority to put in rates on oak ties and expected to receive an answer within a week from said date, and, as soon as rates could be put in, plaintiff would be promptly notified. On said date, viz., November 25th, this defendant addressed two communications to the Interstate Commerce Commission, the first notifying said commissioner of its intention to establish said lumber rate of twenty-four cents as applicable to the movement of oak cross ties between said Louisiana and interstate points, and in the second communication requested the Interstate Commerce Commission to favor defendant with telegraphed authority, permitting it to establish such rate effective on less than statutory notice, defendant thereby seeking to save time in the putting in of said rate and avoid the necessity of giving thirty days' notice, which, in the absence of special authority from the commission, would be necessary in the establishment of said rate. This defendant on December 2nd, received a communication from the Interstate Commerce Commission, through its secretary, advising that if this defendant would make its application in regular form for permission to establish the rate in question on less than statutory notice, the same would have prompt consideration by the commission, and on December 7th this defendant addressed its formal petition to the Interstate Commerce Commission asking that it be permitted under section 6 of the Act to Regulate Commerce to put in force the following rates, to become effective five days after the filing thereof with the Interstate Commerce Commission: "Lumber rates of the class of lumber to which they belong on wood railroad ties, carloads, from points on the Texas & Pacific Railway Company, in Louisiana, Arkansas and Texas to interstate points."

Defendant shows to the Court that the Interstate Commerce Commission did not consider that the application so made was sufficiently specific to warrant their issuing the special authority requested, and, after some further correspondence, in which defendant still *helped* to save time by gaining the permission of the commission, failing in which it concluded that it could put said rate in effect at an earlier date by giving formal statutory notice and abandon its effort to get the rate published by special authority, and accordingly on

19 January 13th, 1908, this defendant issued and forwarded to the Interstate Commerce Commission its joint through lumber tariff so amended as to include "wood railroad cross ties, all kinds, car loads" and said rate, after the expiration of thirty days from the filing thereof with the Interstate Commerce Commission, was in effect and available for the plaintiff herein and all parties having this commodity for shipment between the points covered by said tariff.

This defendant respectfully shows that at no time since the application was made to it for cars for the transportation of said ties had it been in a position where it could lawfully handle the same and that it was not in such position until the tariff mentioned became effect- [effective], under the provisions of the Interstate Commerce Act regulating the subject thereof, on February 13, 1908.

Wherefore, premises considered, defendant prays that upon final

hearing it may go hence without day and recover of the plaintiff all of its costs incurred herein, and defendant asks for such other and further relief, both general and special, as to the Court it may appear entitled.

HIRAM GLASS AND
T. B. McCORMICK,
Att'ys for Def't T. & P. Ry. Co.

Further answering, defendant says that the plaintiff ought not to be allowed to prosecute this suit, for that by Section 9 of the Act of Congress, hereinbefore referred to, and commonly known as the Interstate Commerce Act as amended in 1906, provides that "any person or persons claiming to be damaged by any common carrier, subject to the provisions of this Act, may either make complaint to the Commission as hereinafter provided for or may bring suit in his or their own behalf for the recovery of the damages for which said common carrier may be liable under the provisions of this Act in any District or Circuit Court of the United States of competent jurisdiction, but such person or persons shall not have the right to pursue both of said remedies and must in each case elect which one of the two methods of procedure herein provided for, he or they will adopt."

Defendant shows that on or about the 30th day of September, 1907, plaintiff made complaint to the Interstate Commerce Commission of the United States against the defendant herein, charging it with wrongfully refusing to accept and transport the cross ties mentioned in said petition. Said complaint was brought by the
20 said Railroad Commission to the attention of defendant, and at the instigation and procurement of plaintiff said Interstate Commerce Commission took the matter up with the defendant, and as a result of correspondence and conferences the defendant published and filed its certain tariff, T. & P. 8500-H, as amended February 13, 1908, putting in effect the tariff and freight rate on oak crossties from points on its line of railroad in Louisiana to points on the lines of other roads in Kansas and other states, including Linwood, Kansas, so that the same does not exceed 24 cents per cwt. from any station on its line in Louisiana to Linwood, Kansas, nearer stations taking a lower rate than the above named amount.

Defendant alleges that plaintiff has elected to pursue its remedy before the Interstate Commerce Commission provided for in Section 9 of the Act to Regulate Interstate Commerce, and, therefore, should not be permitted to maintain this suit in this Court, and of this the defendant prays judgment.

HIRAM GLASS AND
T. B. McCORMICK,
Attorneys for Defendant.

Indorsed: No. 2470. American Tie & Timber Co. vs. The Texas & Pacific Ry. Co., Defendant. The Texas & Pacific Railway Company's Second Amended Original Answer. Filed May 5th, 1910. Louis C. Maynard, Clerk.

Jury Roll.

Jury Roll, Filed May 5th, 1910.

In Case No. 2470. U. S. Circuit Court. Impaneled May 5th, 1910. 1. Geo. L. Schmucker; 2. W. A. Esselman; 3. John L. Winniford; 4. J. O. Langston; 5. Claude Stephenson; 6. Chas. R. Randall; 7. L. O. Moore; 8. Geo. Douglass; 9. Geo. G. Taylor; 10. Jerry Connor; 11. Chas. B. Gardner; 12. J. B. Woody.

Indorsed: No. 2470. In the U. S. Circuit Court, Dallas Texas. Jury Roll. American Tie & Timber Co. vs. Texas & Pacific Ry. Co. Filed May 5th, 1910. Louis C. Maynard, Clerk.

21 *Verdict.*

May 12th, 1910.

In the United States Circuit Court for the Northern Judicial Distract of Texas, at Dallas.

Verdict of the Jury in the Case of American Tie & Timber Co. vs. Texas & Pacific Ry. Co., No. 2470.

We, the jury, find verdict for the plaintiff in the sum of $17,112.23, which includes interest at 6% from January 1, 1908, to date.

J. O. LANGSTON, *Foreman.*

Indorsed: No. 2470. U. S. Circuit Court at Dallas, Texas. American Tie & Timber Co. vs. Texas & Pacific Ry. Co. Verdict. Filed May 12, 1910. Louis C. Maynard, Clerk.

Judgment.

Entered May 12, 1910.

From the Minutes of the Circuit Court of the United States for the Northern District of Texas, at Dallas, Vol. 11, Page 54.

No. 2470.

AMERICAN TIE & TIMBER COMPANY
vs.
THE TEXAS & PACIFIC RY. CO. et al.

On this the 5th day of May, 1910, this cause was regularly called for trial and came the parties, plaintiff and defendants, by their respective attorneys, and announced ready for trial. Then came

on to be heard the plea to the jurisdiction of the Court of the defendant, The Kansas City Southern Railway Company, which plea, after being heard and considered by the Court was sustained, to which ruling the plaintiff then and there in open Court excepted.

Then came on to be heard the general demurrer and special exceptions of the defendant, the Texas & Pacific Railway Company in its second amended original answer to the third amended original petition of the plaintiff, which general demurrer and
22 special exceptions, numbered two, three and four and six as to paragraphs seven and eight of the petition, and said defendant's special exception numbered seven were overruled by the Court, to which ruling the defendant, The Texas & Pacific Railway Company, then and there in open Court excepted, and the Court sustained said defendant's special exceptions numbered five and six as to paragraphs ten and twelve of the plaintiff's petition, to which ruling of the Court the plaintiff then and there in open Court excepted.

Then came a jury of twelve good and lawful men, to-wit, J. O. Langston and eleven others, who were duly and legally selected, impaneled, qualified and sworn to try this cause, and before said jury the pleadings and evidence were introduced; and at the close of the evidence the defendant, The Texas & Pacific Railway Company made a motion to dismiss the cause without prejudice for the reason that the case as developed, was one which the Interstate Commerce Commission should alone take original cognizance and of which the Circuit Court of the United States could not rightfully exercise its jurisdiction, and said motion being duly presented and considered, the Court is of the opinion that the same should be, and the same is hereby in all things overruled, to which the defendant then and there in open Court excepted; and

Thereafter, the jury having heard the pleadings, evidence, argument of counsel and charge of the Court, retired to consider of their verdict, and on May 12th, 1910, returned into open Court the following verdict, to-wit:

"We, the jury, find verdict for the plaintiff in the sum of $17,112.23, which includes interest at 6% from January 1, 1905 to date.

(Signed) J. O. LANGSTON, *Foreman.*

It is therefore ordered, adjudged and decreed by the Court that the plaintiff, The American Tie & Timber Company, Limited, do have and recover of and from the defendant, The Texas & Pacific Railway Company, the sum of seventeen thousand, one hundred and twelve dollars and twenty-three cents ($17,112.23) with interest thereon from this date at the rate of six per cent. (6%) per annum, together with all costs incurred and expended in this cause, and for which execution may issue.

It is further ordered, adjudged and decreed by the Court that said plaintiff also have and recover of and from said defend-
23 ant, The Texas & Pacific Railway Company, the sum of twenty-five hundred dollars ($2,500.00) reasonable statutory

attorney's fees herein, to be taxed as part of the costs in this suit, and to be included in the execution aforesaid, to which action of the Court in the allowance of said attorney's fees the defendant in open Court excepted.

It is further ordered, adjudged and decreed by the Court that this suit be and it is hereby dismissed as to the defendant, the Kansas City Southern Railway Company, and that it go hence and recover of the plaintiff, its costs in this behalf incurred, for which execution may issue.

Order Overruling Motion for New Trial.

Entered June 6, 1910.

From the Minutes of the Circuit Court of the United States for the Northern District of Texas, Vol. 11, Page 77, at Dallas.

No. 2470.

AMERICAN TIE & TIMBER CO., LIMITED,
vs.
TEXAS & PACIFIC RAILWAY COMPANY.

JUNE 6TH, 1910.

This day came on to be heard the defendant's motion for a new trial, and the Court having heard and considered said motion is of opinion that same is not well taken, it is therefore ordered by the Court that said motion be and the same is hereby overruled and refused. It is further ordered that the defendant be and is hereby allowed ninety days from and after the adjournment of the term within which to prepare and file its bill of exceptions herein, and that its supersedeas writ of error bond in this cause be and is hereby fixed at the sum of $23,000.00.

24 *Order Extending Time for Filing Bill of Exceptions.*

Entered October 5th, 1910.

From the Minutes of the Circuit Court of the United States for the Northern District of Texas, at Dallas, Vol. 11, p. 92.

No. 2470.

AMERICAN TIE & TIMBER CO., LIMITED,
vs.
THE TEXAS & PACIFIC RY. COMPANY.

OCTOBER 5TH, 1910.

On this day came on to be heard the application of the defendant for an *exception* of time for filing its bill of exceptions in the above

cause, and it appearing to the Court that the record was large and required considerable time for its proper examination and incorporation in a bill of exceptions, and that the defendant's counsel has been reasonably diligent, but that its time and ability to get the bill filed within the limit of the original order has been unexpectedly limited by the enforced absence of the presiding judge, due to the condition of his health, and that on account of same the defendant may be placed in a position of difficulty to itself and annoyance to the Court in attempting to get the bill filed within the time of the original order, and on account of the uncertainty of transportation the bill might not be returned in time for filing.

It is therefore ordered that the time for filing of said bill may be extended for thirty days from this date.

October 5th, 1910.

A. P. McCORMICK,
Circuit Judge, 5th Circuit.

25 *Bill of Exceptions.*

Filed October 21, 1910.

In the Circuit Court of the United States for the Northern District of Texas.

No. 2470.

AMERICAN TIE & TIMBER COMPANY, LIMITED,
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY.

Bill of Exceptions.

Be it remembered, that in the trial of said cause in this Court at the May term, A. D. 1910, of said Court, the Honorable E. R. Meek, Judge presiding, the following proceedings were had, to-wit:

The above cause had been consolidated with "American Tie & Timber Company, Limited, No. 2473, versus Kansas City Southern Railway Company," but the Court's action on a plea to the jurisdiction presented by the Kansas City Southern Railway Company was favorable to that company and resulted in its being dismissed from the Court, and the further proceedings had related to trial against the Texas & Pacific Railway Company, and to sustain the issue on their respective parts, the parties respectively put in evidence the testimony hereinafter shown, and they offered in evidence the testimony hereinafter shown to have been offered by them respectively and excluded on objection, and no other testimony was received in evidence, other than that which hereinafter appears. The several exceptions to the admission and rejection of testimony offered as hereinafter set forth were each duly reserved in open Court before the jury and before the jury retired. The testimony

offered, admitted and excluded, and the exceptions reserved to the admission and exclusion of testimony were as duly set forth hereafter, viz.:

Number 2470.

AMERICAN TIE & TIMBER COMPANY, LIMITED,
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY.

Rodgers & Dorough and W. H. Clark, for the Plaintiffs.
Hiram Glass and T. B. McCormick, for the Defendant.

26 MAY 5TH, 1910.

JOHN J. MARSHALL, a witness for the plaintiff, being duly sworn, testified as follows:

By Mr. ROGERS:

Q. Your name is J. J. Marshall?
A. Yes, sir.
Q. Where do you reside, Mr. Marshall?
A. Texarkana, Texas.
Q. Where did you reside in 1907?
A. At Shreveport, Louisiana, in August, 1907.
Q. In what business were you engaged in 1907?
A. I was manager of the American Tie & Timber Company, Limited.
Q. When did you first become connected with it?
A. August 1st, 1907.
Q. In the capacity of manager?
A. As manager, yes.
Q. Is the American Tie & Timber Company a corporation?
A. Yes, sir.
Q. Incorporated under the laws of the State of Louisiana?
A. Yes, sir.
Q. I will ask you to look at this paper and state what it is? (Witness is shown written document.)
A. This is a contract signed by our president and the purchasing agent of the Union Pacific Railroad Company for one hundred and fifty thousand crossties.
Q. Is this the contract on which these suits are based?
A. Yes, sir.

Mr. ROGERS: We introduce the contract in evidence.

Proposal to Furnish Cross Ties.

Heretofore printed at page 11.

* * * * * * *

Q. Now, Mr. Marshall, after the American Tie and Timber Company made this contract with the Union Pacific, what steps, if any,

were taken to carry out the contract by the American Tie & Timber Company?

A. When I went with the American Tie and Timber
27 Company in August, 1907, I immediately set to work along the line of the Texas and Pacific Railway Company in Louisiana and Arkansas and the Kansas City Southern in Louisiana and Arkansas, to get the ties to fill the contract with and did accumulate a good number of them.

Q. You did get quite a number of them?

A. Yes, sir.

Q. When were you ready—was the American Tie & Timber Company ready to commence shipment by the first of October, under that contract, as provided therein?

A. Between the 25 of September and the first day of October, we were ready to commence the first delivery of the ties.

Q. Did you deliver any ties during that time?

A. A few carloads, yes.

Q. How many carloads?

A. I believe nine from Kansas City Southern and three from the Texas and Pacific.

Q. Do you know what points they were shipped from?

A. Two cars were shipped from Cypress, Louisiana, on the Texas and Pacific and one from Chopin on the Texas, and the others from Kansas City Southern, were shipped from Frierson and Holly, Louisiana.

Q. Where were they billed and who were the consignees?

A. They were billed to the Union Pacific Railroad Company at Linwood, Kansas.

Q. At what rate of freight?

A. Twenty-four cents per hundred.

Q. Through rate?

A. Those that went to Linwood were delivered at 24 cents rate, a portion of them were held at Kansas City and delivered to them at Kansas City at 23 cents.

Q. What portion?

A. Those shipped from the Kansas City Southern.

Q. How many cars on the Kansas City Southern were delivered on Linwood billing?

A. I am not positive at this time, but I believe, two.

Q. Well, did you try to ship any others?

A. Yes; made continuous efforts to move them.

Q. What efforts did you make, did you demand cars? If so, through whom and in what way?

A. We ordered cars from the chief dispatcher of the Kansas City Southern at Shreveport, and had the cars placed for us to load at
Holly, Louisiana, and after loading some of them, then they
28 notified them not to load any more and took the cars away they had placed for us to load, and said they had no rate on crossties and therefore we must not load them. On the Texas and Pacific they billed three cars for us at Marthaville and after the cars were loaded they positively refused to sign bill of lading or move

them under that rate or any other rate—under 24 cents or any other amount.

Q. Three cars at Marthaville, they furnished the cars——

A. Furnished the cars, and we loaded the ties into them and they refused to give us a bill of lading.

Q. Of whom did you request that the cars be placed at Marthaville?

A. Mr. R. C. Andrews, at Marshall, Texas.

Q. Please examine that letter and see if you—that letter from W. J. Small, to the American Tie & Timber Company, dated November 26, 1907, and say if you received that letter?

A. Yes; that is a letter written to us by Mr. Small.

Q. Who was Mr. Small at that time?

A. He was an agent for the Texas and Pacific Railway Company at Marthaville, Louisiana.

Q. Does this letter refer to the cars you mentioned as being loaded there?

A. Yes, sir; I stated three cars. I notice the letter says four.

Mr. ROGERS: We introduce the letter in evidence.

THE TEXAS & PACIFIC RAILWAY CO.,
MARTHAVILLE, LA., STATION, *November* 28, 1907.

American Tie & Timber Co., Shreveport, La.

DEAR SIR: Referring to yours next attached in regards to B-L unsigned, beg to advise that I am unable to furnish the B-L whatever, as the instructions are not to furnish any B-L under any circumstances. You find Nos. and Initials of cars below:

C. B. & Q.	27368	400	No. 1 Oak Ties
M. O. P.	16717	400	No. 1 Oak Ties
P. M.	31459	175	Oak Ties
W. A. B.	60801	358	No. 1 Oak Ties
Total		1333	

29 I could of finished cars but I was stopped. I have instruction to ascertain from your people and advise what price you will take for the oak ties loaded, if cars don't move soon there will be demurrage on them, $1.00 per day; there is no rate on oak ties or oak timber to Linwood, and if you are unable to move them and wish to dispose of them at a reasonable price, kindly let me know and will try and place them for you. However, I hope you will be able to move them soon.

Yours truly,

W. J. SMALL.

Mr. ROGERS: Did you receive that letter from Mr. Small?

A. I did.

Q. Were these the cars you say you were unable to get bill of lading for?

A. Yes, sir.

Q. What became of these ties, Mr. Marshall?

A. They were sold to the Texas & Pacific Railway Company.

Q. Why were they sold to the Texas & Pacific Railway Company?

A. They were the only people I could sell them to: we couldn't move them from Marthaville.

Q. Were these cars requested and loaded for the purpose of carrying out the contract with the Union Pacific Railroad Company to ship these cars to Linwood, Kansas?

A. They were.

Q. When the company refused to give you a bill of lading or move them, you sold them to the Texas & Pacific Railway Company?

A. Yes, sir.

Q. At what price?

A. Forty-five cents.

Q. What would have been your net price at Marthaville for these ties if you had been able to ship them on your contract to the Union Pacific Railroad Company?

A. In the neighborhood of fifty cents.

Q. There was a loss in these ties of about five cents apiece?

A. Yes, sir.

Q. Now, with reference to the Texas and Pacific: you have stated that you accumulated by the first of October a number of ties along each line and had contracted for the other ties?

A. I had; yes.

30 Q. State the nature of these contracts?

A. When we started to supply the ties to the Union Pacific we went to different men we made contracts with and arranged with them to take their oak ties as long as this contract with the Union Pacific lasted, and after the contract was canceled, then we went back to these same men and asked them please not to make us take any more ties than they agreed to make us take—for instance, we contracted with men stationed at points along the railroad and we took only what we were obligated to take from them and had finally accepted, and we allowed it to string along pretty near a year before we took all of them.

Q. These contracts were entered into for the purpose of enabling you to accumulate one hundred and fifty thousand ties to deliver to the Union Pacific under this contract?

A. Yes.

Q. Did you make an absolute contract to take a certain number of ties from these contractors?

A. No, sir; we agreed to take all the ties they would produce.

Q. Were they to place them—where were they to deliver them?

A. They were to deliver them to us at loading points on the Kansas City Southern and Texas and Pacific Railway.

Q. Then, how many ties in all did you accumulate in all along the line of the Texas and Pacific Railway in Arkansas and Louisiana?

A. In the neighborhood of forty-five thousand.

Q. In the neighborhood of forty-five thousand, altogether?

A. Yes, sir.

Q. At what stations were they?

A. They were at Chopin, Derry, Waller's Spur, Provencal, Cypress, Marthaville, Whitlock and a number of other stations in Louisiana and at Fouke, Arkansas.

Q. Have you any memorandum from which you can——

A. Yes; I have an absolute list of them in my pocket.

Q. As to the number you had at each station?

A. Yes, sir.

Q. Use it to refresh your memory and state the number you had at each station along the Texas and Pacific?

A. (Witness refers to memorandum.) At Bridges Mill, 710; Chopin, 839——

Mr. GLASS: What date is that?

31 A. I didn't put the date down, Mr. Glass, but these are the ties we took under the Union Pacific contract; you understand, we sold these ties to the I. & G. N. Railroad and accumulated some more to fill that contract.

Derry, 5,948; Fouke, Arkansas, 11,836; Marthaville, Louisiana, 8,226; Provencal, 1,127; Mansfield, 1,185; Robeline, 885; Powhattan, 3,581; Grand Bayou, 971; Hayti, 1,719; Sodus, 1,211; S. & G. Spur, 1,437; Thigpen, 710; Waller's Spur, 493; Whitlock Spur, 2,033.

Mr. RODGERS: Did you call out Waller's Spur?

A. Yes.

Q. That makes a total of 44,541 ties?

A. 44,573 is the exact amount.

Q. Were all these places places for loading and shipping ties?

A. They were.

Q. Now, you stated that these ties are the ties that you brought and contracted for after the execution of the contract with the Union Pacific and for the purpose of filling that contract?

A. Yes, sir.

Q. When did you get these ties—deliver them—when did they commence delivering them on the line of the road for shipment?

A. Long about the 10 of August, 1907.

Q. Then, how long did they continue to deliver them?

A. Until the middle of July, 1908.

Q. Why were they delivering them after December, after the Union Pacific contract had been——

A. I had contracted with my sub-contractors—the people who produced the ties to pay them, and was under obligation to take what ties they made—what ties they could not dispose of to some one else.

Q. Would these ties have been delivered any earlier than July, 1908, if the contract with the Union Pacific had remained in force?

A. Certainly, they were ready for delivery any time, any time I had money to pay for them.

Q. The contract called for 15,000 ties per month; how many did you have along the line of the railroad—of the Texas and Pacific Railroad, approximately, during the month of October, 1907?

A. Twenty-three or twenty-four thousand.

Q. During the month of November?

A. November, I expect we took five thousand more, six thousand.

Q. You took them along, some in January?

A. Some in January, some in February and along until in July we took the last under that contract.

Q. That you were obligated under your contract for?

A. Yes, sir.

Q. These contracts were made in view of the Union Pacific contract?

A. Yes, sir.

Q. They would have been delivered all right, but for the fact that you couldn't get them moved?

A. Yes; I held them until such time as I could dispose of them.

Q. You had ample time at these stations you mentioned in October and November to make delivery of 15,000 per month that you contracted for?

A. If I had taken from both lines I had, I could have carried my contract along all right without any trouble.

Q. Your contract was 150,000 ties, you were to get them at points on the two lines of railroad?

A. Yes, sir.

Q. What were your facilities and your arrangements along each line of railroad for getting out these ties?

A. On the Texas and Pacific I had two regular men and on the Kansas City Southern I had three regular men who produced ties for me and looked after them.

Q. Was the American Tie and Timber Company organization such as would enable it to carry out this contract for 150,000 ties according to its terms?

A. Yes, sir.

Q. You organized then, on two lines of railroad; how many ties did you expect to get off of each line?

A. We intended to ship ninety thousand from the Kansas City Southern and sixty thousand from the Texas and Pacific.

Q. You organized your field force accordingly?

A. Yes, sir.

Q. If the railroads had received—furnished cars and transported the ties as you offered them, could you with your facilities have carried out the contract according to its terms?

A. Yes; to the letter.

Q. What prevented you from carrying it out?

A. The railroad companies refused to move the ties for me.

33 Q. When did they first refuse to move the ties on the Texas and Pacific?

A. I believe the first of November, along about that time—the latter part of October or the first of November, 1907.

Q. With whom were you dealing when the refusal was made? What representative of the Texas and Pacific Railroad?

A. That would be a hard matter to state; I wrote to Mr. Andrews

for cars, and my first intimation was a letter or telegram from Mr. Small, the agent at Marthaville, that they would not move them.

Q. What position did Mr. Andrews occupy?

A. He was assistant superintendent at Marshall, Texas.

Q. You wrote him, asking for cars?

A. Yes, sir.

Q. Here is a latter [letter] dated October 15, 1907, addressed to C. J. Andrews, superintendent of the American Tie & Timber Company; state if that is one of your requests?

A. That is a copy of my letter; yes.

Q. Here is one dated November 17, 1907, addressed to the same party?

A. I also wrote that one.

Mr. RODGERS: We introduce the two letters in evidence of date October 15, 1907, and November 15, 1907.

OCT. 15, 1907.

Mr. C. J. Andrews, Superintendent, Texas & Pacific Ry. Co., Marshall, Texas.

DEAR SIR: Please have us furnished with 5 cars at Marthaville, La.; 7 cars at Powhattan, La.; 7 cars at Derry, La., and 1 car at Sodus, La., to be loaded with crossties for the Union Pacific Ry. Co., destined to Linwood, Lansas [Kansas.]

Please advise us as soon as convenient when the cars will be placed for loading.

Yours truly,

AMERICAN TIE & TIMBER COMPANY,

By —— ——, *Manager.*

34 NOV. 17TH, 1907.

Mr. R. C. Andrews, Superintendent, Tex. & Pacific Ry. Co., Marshall, Texas.

DEAR SIR: Under date of Oct. 15th, 1907, we wrote you as follows: "Please have us furnish- with 5 cars at Marthaville, La.; 7 cars at Powhattan, La.; 7 cars at Derry, La.; 1 car at Sadus, La., to be loaded with crossties for the Union Pacific Ry. Co., destined to Linwood, Kansas.

Please advise us as soon as convenient when the cars will be placed for loading."

It has now been a month since we made this request, but so far we have not heard from you nor have any of the cars been furnished.

If you were unable or did not feel inclined to furnish cars as a business proposition, we feel that you should have said so, and we now request an immediate answer to our letter of Oct. 15th.

Yours truly,

AMERICAN TIE & TIMBER CO., LIMITED,

By —— ——, *Manager.*

Mr. RODGERS: Did you get any of the cars requested in these letters?

A. These are the four we got at Marthaville, in response to the last letter.

Q. Did you make request of any other agent of the defendant railroad company for cars?

A. When we first started to ship I wrote the agent at Cypress for cars and he had *then* [them] furnished and also Chopin, he furnished them; these were the ones shipped. Afterwards I wrote Mr. Andrews for particular points from which we wished to move them.

Q. You had ties at each point you mentioned in the list to Mr. Andrews ready for loading at the time you wrote the letters?

A. Yes, sir.

Q. I see a request to the agent at Cypress, October 19, for three cars, do you know whether you got these or not?

A. Yes; that letter was written and cars promptly furnished, but only loaded two of them; we didn't have enough ties to complete the three.

Q. At that place?

A. Yes, sir.

35 Q. Did you get any answer from Mr. Andrews to these letters we have just read?

A. I did; yes.

Q. (Hands witness letter). Is that it?

A. Yes; this is the answer.

Mr. RODGERS: We offer in evidence reply of Mr. Andrews, dated November 18, 1907, as follows:

The Texas & Pacific Railway.

Office of R. C. Andrews, Asst. Superintendent.

MARSHALL, TEX., *Nov.* 18, 1907.

Mr. J. J. Marshall, Manager, American Tie & Timber Co., Shreveport, La.

DEAR SIR: Replying to your favor of the 17th, I beg to advise that I have not seen any of your other letters. I find, however, that the letters were received in the office, but as they were merely orders for cars it was not thought that you would expect an answer, and the orders were filed on our books. As you know, cars have been very scarce for a long time, and as your shipments go to the Union Pacific, we have not been able to secure the kind of equipment that could be applied on the orders. You seem to be under the impression that ye do not want to *to* furnish cars for your ties; your business is as good to us as any one's business, but as you- [your] ties go to points rou*n*ted via several other lines, we would not care to furnish Texas and Pacific cars for such shipments, if possible to avoid it. We will probably be able to give you a few cars within the next few days, and will fill all of your orders as soon as possible.

Yours truly,

R. C. ANDREWS.

P. S.—On account of the Texarkana yard being congested, we will probably have to delay the shipments that route that way, and we will furnish Derry first, as they will route via Alexandria.

Q. Did you get any ties—any cars?

A. Only these four at Marthaville, is all we got.

36 Q. Well, did you make any attempts to get cars and if so, to whom?

A. After that the agent at Marthaville informed me they had no rates and could not move any ties to Linwood. I then wrote to Mr. Thorne, or telegraphed to Mr. Thorne, asking him to have cars placed for loading the ties; Mr. Thorne was general manager of the road.

Q. I hand you telegram, dated Shreveport, Louisiana, November 25th, 1907, addressed to L. S. Thorne, general manager of the Texas and Pacific Railway Company, was that sent to him, is that the letter or telegram?

A. That is a copy of the telegram I sent to Mr. Thorne.

Q. (Witness is shown another paper). Is that a copy of the reply you received or is that the original?

A. That is the original reply.

Mr. RODGERS: We introduce the telegrams which read as follows:

SHREVEPORT, LA., *Nov. 25th,* 1907.

Mr. L. S. Thorne, General Manager, Texas & Pacific Railway Company, Dallas, Texas:

Please have placed on or prior to December fourth, cars as follows at stations on your line in Louisiana: Hati, four; Marthaville, thirteen; Powhattan [Powhattan], nine; Whitlocks Spur, one; Caldwells Spur, two; Bridges Mill, one; Derry, fifteen; Wallers Spur, one; Sodus, four; Robeline, three; Provencal, four; S. & G. Spur, five; Grand Bayou, three; Thigpens Spur, one, to be loaded with wood railway crossties for Union Pacific Railroad, Linwood, Kansas, these ties were sold for eighty-six cents each delivered on your published lumber tariff now in effect and represent a profit to us of seventeen cents each. Answer when cars will be placed for loading.

AMERICAN TIE & TIMBER CO., LIMITED.

Received at 15 Da H H 81 D H 9:50 P. M.

DALLAS, TEXAS, 11/26.

American Tie & Timber Co., Ltd., S'port, La.:

Your message ordering certain cars to be loaded with railway crossties for Union Pac. If these shipments are oak ties, we hereby notify you there are no interstate rates in effect at this time

37 on oak ties, and you must not load equipment until such rates are put into effect. We have applied to Interstate Commerce Commission for authority to put in rates on oak ties and should receive answer within one weeks, and will prompt- acquaint you with their decision.

L. S. THORNE.

Q. Did you get any information from Mr. Thorne after that?

A. No, sir; they never did notify me that the rate was in.

Q. I hand you letter dated October 10, 1907, addressed to E. L. Sargeant; please state whether or not you wrote that letter to Mr. Sargent?

A. I did; that is a copy of it.

Q. What position did Mr. Sargent occupy at that time?

A. General freight agent of the Texas and Pacific at Dallas.

Mr. RODGERS: We introduce in evidence letter dated October 10, 1907, addressed to E. L. Sargent, general freight agent of the Texas and Pacific Railway Company at Dallas, reading as follows:

SHREVEPORT, LA., *Oct. 10th*, 1907.

Mr. E. L. Sargent, General Freight Agent, Texas & Pacific Ry. Co., Dallas, Texas.

DEAR SIR: Will you kindly advise us the proper person connected with your company to whom we should make requests for cars in which to load railway crossties now on sidings and spurs of the Texas & Pacific Railway in Louisiana, north of Boyce, La., and between Natchitoches and Shreveport.

We have about 35 car loads which we wish to ship to the Union Pacific Ry. Co. at Linwood, Kansas, and desire to move them as promptly as possible, and would appreciate a reply at your earliest convenience.

Yours truly,

AMERICAN TIE & TIMBER CO., LIMITED,

By —— ——, *Manager*

Q. Do you know whether or not you got an answer from him?

A. I have no recollection of receiving an answer from Mr. Sargent.

Q. I show you a letter dated December 14, 1907; addressed to L. S. Thorne; is that written by you?

38 A. Yes; I wrote that.

Mr. RODGERS: We introduce in evidence letter dated December 14, 1907, addressed to Mr. L. S. Thorne, general manager of the Texas and Pacific Railway Company at Dallas, which reads as follows:

DECEMBER 14TH, 1907.

Mr. L. S. Thorne, General Manager, Texas & Pacific Ry. Co., Dallas, Texas.

DEAR SIR: Referring to your telegram of November 26, 1907:

You advised us that you had applied to the Interstate Commerce Commission for authority to put in rates on oak ties, and that you should receive an answer within one week, and that you would promptly acquaint us with their decision.

More than two weeks have past and we have not heard anything further from you, and we would be glad to be advised what rate you proposed to put in oak railway cross ties.

Yours truly,

AMERICAN TIE & TIMBER CO., LIMITED,

By —— ——, *Manager.*

Mr. RODGERS: I show you letter dated December 14, 1907, from Mr. Thorne to Mr. Marshall, did you receive that letter?

A. Yes, sir.

Mr. RODGERS: We offer in evidence letter dated December 14, 1907, from L. S. Thorne to J. J. Marshall which reads as follows:

El Paso Route.

The Texas & Pacific Railway Co., L. S. Thorne, Vice-President and General Manager; J. W. Everman, Ass't General Manager.

DALLAS, TEXAS, *Dec.* 17, '07.

Mr. J. J. Marshall, Manager, American Tie & Timber Co., Shreveport.

DEAR SIR: Answering your letter of December 4th, our company duly applied to the Interstate Commerce Commission for
39 authority to put in rates on oak ties as per our advice to you at that time, but, so far, the application has not been granted.

Respectfully,

L. S. THORNE.

Q. I present to you for reading a letter dated September 24, 1907, addressed to E. L. Sargent; you wrote that letter?

A. Yes; that is a copy of it.

Mr. RODGERS: We introduce in evidence letter dated September 24, 1907, written by the plaintiff to Mr. E. L. Sargent, general freight agent of the Texas and Pacific Railway Company at Dallas, which reads as follows:

SEPTEMBER 24TH, 1907.

Mr. E. L. Sargent, General Freight Agent, Texas & Pacific Ry Co., Dallas, Texas.

DEAR SIR: Please advise us your rate on oak railway crossties, from Marthaville, La.; Sodus, La., and Derry, La.; to El Paso, Texas, Abile*be* [Abilene] Texas; Marshalltown, La.; Minneapolis, Minn.; Waterloo, Ia.; Linwood, Kansas; Chicago, Ills.; Kansas City, Mo.; Colorado Springs, Colo., and Junction City, Kansas.

A prompt reply will be greatly appreciated.

Yours very truly,

AMERICAN TIE & TIMBER CO., LIMITED,

By —— ——, *Manager.*

Q. Did you get a reply to that letter?

A. No, sir.

Q. I hand you a letter dated Marthaville, Louisiana, November 23, 1907, signed W. J. Small, written on a telegraph blank; did you receive that letter in due course of mail?

A. I did.

Mr. RODGERS: We introduce the letter in evidence dated November 23, 1907, written by W. J. Small, addressed to American Tie and Timber Company, Shreveport, which reads as follows:

40 (Written on Telegraph Blank of Texas & Pacific Ry. Co.)

From MARTHAVILLE, LA., 11/23/1907.

To American Tie & Timber Co., Shreveport, La.

DEAR SIRS: I have had loaded for you all 4 cars oak ties which is ready to go forward, and have been notified not to issue any B-L for oak ties for Linwood, Kas., as there was not any rates in effect for oak ties or oak Lbr. Kindly advise what I shall do with the cars. I have done paid the loaders for loading same and am unable to furnish B-L for them under the circumstances, however, cars were furnished for this business. Please advise quick. Amount ties loaded 1333 at 2 cts. tie, $26.66.

Yours truly,

W. J. SMALL.

Q. Mr. Small was agent for the Texas and Pacific at Marthaville, was he?

A. Yes, sir.

Q. I hand you a letter dated November 25, signed C. N. Nesom. Who was C. N. Nesom?

A. He was at this time agent for the Texas & Pacific Railway Company at Shreveport, Louisiana.

Q. Did you receive this letter?

A. Yes, sir.

Mr. RODGERS: We introduce in evidence letter dated November 25, 1907, written by C. N. Nesom, agent for the Texas and Pacific Railway Company at Shreveport, Louisiana, addressed to the American Tie and Timber Company at Shreveport, which reads as follows:

The Texas & Pacific Railway Company.

Office of ——.

SHREVEPORT, LA., *Nov. 25th,* 1907.

The American Tie & Timber Co., Market St., City.

GENTLEMEN: Please note attached telegram from Mr. Andrews, Asst. Supt., Marshall, relative to 4 cars oak cross ties that were loaded at Marthaville by you people, and after they were loaded discovered that we did not carry any interstate rates on oak

41 ties.

Please advise us immediately upon receipt of this, in line with Mr. Andrews' request, and oblige,

Yours truly,

C. N. NESOM,
Freight Agent.

Mr. RODGERS: We also introduce in evidence the following telegram:

MARSHALL, 11-25-07.

C. N. Nesom, Agent, Shreveport, La.:

Referring to our several wires relative to loading oak cross ties at various places for the American Tie & Timber Co., we loaded 4 cars of these ties at Marchaville [Marthaville] and afterwards found out that there was no rate in effect on oak ties out of the state and we cannot handle them, but rather than unload them we thought best to ascertain from this firm what the ties can be bought for and if at a reasonable price this company will buy them. Please call them up and get this information and advise early as possible.

R. C. ANDREWS.

Q. Did Mr. Nesom call on you with reference to the purchase of the ties?

A. No, sir; Mr. Andrews did.

Q. You testified you sold them after they refused to let you move them?

A. Yes, sir.

Q. Mr. Marshall, what efforts, if any, did you make to get cars to ship ties—cars from the Kansas City Southern?

A. I requested cars of the chief dispatcher at Shreveport, to place at stations in Louisiana to load ties in.

Q. I hand you letter dated September 21, 1907, addressed to R. R. Mitchell, assistant general freight agent of the Kansas City Southern; did you write that letter?

A. I did.

Mr. RODGERS: We introduce in evidence this letter dated September 21, 1907, from plaintiff to R. R. Mitchell, assistant general freight agent of the Kansas City Southern Railroad, which reads as follows:

42 SEPT. 21, 1907.

Mr. R. R. Mitchell, Assistant General Freight Agent, Kansas City Southern Ry. Co., Texarkana, Texas.

DEAR SIR: Please advise us your rate on oak railway cross ties from Converse, La.; Frierson, La.; Holly, La.; Leesville, La.; Mansfield, La.; Vivian, La., and Trenton, La., to Kansas City, Mo.; Waterloo, Ia.; Marshalltown, Ia.; Minneapolis, Minn.; Manning, Ia.; Ellsworth, Kan.; Eaton, Colo.; Linwood, Kan.; Concordian, Kan., and Junction City, Kan.

A prompt reply will be greatly appreciated.

Yours truly,

AMERICAN TIE & TIMBER CO., LTD.,
By —— ——, *Manager.*

Q. I hand you a letter dated October 10th, 1907, addressed to R. R. Mitchell, did you write that letter?

A. That is a copy of the letter I wrote.

Mr. RODGERS: We introduce in evidence letter dated October 10, 1907, addressed to R. R. Mitchell, assistant general freight agent,

Kansas City Southern at Texarkana, Texas, by the plaintiff, which reads as follows:

OCT. 10TH, 1907.

Mr. R. R. Mitchell, Assistant General Freight Agent, Kansas City Southern Ry. Co., Texarkana, Texas.

DEAR SIR: Will you kindly advise us the proper person connected with your company to whom we should make requisitions for cars in which to load railway cross ties now on sidings and spurs, between Mena, Ark., and Port Arthur, Texas.

We have about 50 car loads which we wish to ship to the Union Pacific Ry. Co. at Linwood, Kansas, and desire to move them as promptly as possible and would appreciate a reply at your early convenience.

Yours truly,

AMERICAN TIE & TIMBER CO., LTD.,

By —— ——, *Manager.*

Q. Why did you write this letter to Mr. Mitchell?

A. To be sure on whom to make requests for cars.

43 Q. As to the proper person to request cars of?

A. Yes, sir.

Q. Did he reply to this letter?

A. Mr. Mitchell, I think, replied to all the letters I wrote to him. This is a copy of the letter.

Mr. GLASS: Where is the original?

Mr. RODGERS: You have them; this is the one that was introduced before.

Mr. GLASS: I object to this; this is not the original letter.

Mr. RODGERS: It seems to be the copy of the letter introduced and marked before.

The WITNESS: The original is with the Interstate Commerce Commission.

Q. You testify that the original of this was sent to them, by whom?

A. By myself.

Q. Is this an exact copy of the letter you received from Mr. Mitchell and which you forwarded to the Interstate Commerce Commission?

A. I cannot say, positively, I think it is. We made copies of them and checked them and identified them.

Q. You compared them after the copy was made?

A. I did.

Q. You can state that it is a compared copy, is it?

A. That was done a couple of years ago, Mr. Rodgers, it was made for a copy, and I believe it is a copy and I made it.

Mr. GLASS: Did you make it yourself?

A. I did; yes.

Q. The original you say you sent to the Interstate Commerce Commission?

A. Yes, sir.

Mr. GLASS: I believe it is decided that where it is not in the jurisdiction of the Court a copy may be introduced.

44 Mr. RODGERS: We introduced in evidence a letter dated Texarkana, Texas, October 11, 1907, addressed to plaintiff, which reads as follows:

(Letterhead, Kansas City Southern Ry. Co.)

TEXARKANA, TEXAS, *October 11th*, 1907.

American Tie & Timber Company, Shreveport, La.

GENTLEMEN: I am in receipt of your favor of Oct. 10th, requisition for cars for points between Shreveport and Port Arthur should be made to E. S. Hill, Chief Dispatcher, Shreveport, La. For points between Mena and Shreveport, on D. Mills, Chief Dispatcher, Texarkana, Texas.

Yours truly,

(Signed) R. R. MITCHELL, *G. F. A.*

Q. I hand you letter, dated October 29, 1907, addressed to E. S. Hill, chief dispatcher, Kansas City Southern Ry. Co., by your company; did you write that letter?

A. This is a copy of a letter written by me to Mr. Hill.

Q. The original of it you mailed to Mr. Hill?

A. Yes, sir.

Mr. RODGERS: We introduce in evidence this copy of letter written to Mr. Hill, by plaintiff, dated October 29, 1907, which reads as follows:

Old Phone No. 793.

OCT. 29TH, 1907.

Mr. E. S. Hill, Chief Dispatcher, Kansas City Southern Ry. Co., Shreveport, La.

DEAR SIR: Please have placed at Mansfield, La., (4) four cars; Holly, La., (8) eight cars; Trenton, La., (6) six cars; Hollingsworth, La., (5) five cars; Frierson, La., (4) four cars.

For us to load oak railway cross ties we now own and have at those stations, and desire to ship by the Kansas City Southern Ry. Co. to the Union Pacific Ry. Co., at Linwood, Kansas.

Please advise us either by letter or telephone when the cars will be placed for loading.

45 We have been notified by your Assistant General Freight Agent, Mr. R. R. Mitchell, at Texarkana, Texas, to make requests on you for cars to be loaded at stations between Shreveport, La., and Port Arthur, Texas.

Yours very truly,

AMERICAN TIE & TIMBER CO., LIMITED,

By —— ——, *Manager.*

Q. I hand you letter, dated November 16, 1907, addressed to E. S. Hill, Chief Dispatcher; is that a copy of letter you sent him on that date?

A. It is; yes, sir.

Mr. RODGERS: We introduce this letter in evidence (copy) dated November 16, 1907, addressed to E. S. Hill, Chief Dispatcher, Kansas City Southern Railway Company, Shreveport, Louisiana, by the plaintiff, which letter reads as follows:

SHREVEPORT, LA., *Nov. 16th,* 1907.

Mr. E. S. Hill, Chief Dispatcher, Kansas City Southern Ry. Co.

DEAR SIR: On October 29th we wrote you as follows: "Please have placed at Mansfield, La., (4) cars; Holly, La., (8) eight cars; Trenton, La., (6) six cars; Hollingsworth, La., (5) five cars; Frierson, La., (4) four cars.

For us to load oak railway crossties which we now own and have at those stations and desire to ship by the Kansas City Southern Ry. Co. to the Union Pacific R. R. Co., at Linwood, Kansas.

Please advise us either by letter or telephone when the cars will be placed for loading.

We have been notified by your Assistant General Freight Agent, Mr. R. R. Mitchell, at Texarkana, Texas, to make requests on you for cars to be loaded at stations between Shreveport, La., and Port Arthur, Texas."

We did not hear anything from you by November 9th, and I sent one of my men to your office to see when we could expect to be furnished with some of the cars, and he was unable to get any answer on which we could depend. On November 15th, your Mr. Clawson telephoned us that there was one Union Pacific car at Frierson, La., that we could load, and on this information I went to Frierson to load the car, but on arrival your agent at that point told me
46 that he could not sign any bills of lading for cars containing oak cross ties, but that he could telegraph to the official in charge of such matters and find out if the instructions would now permit him to receive such shipments, but before he received any answer the car that he said was the one that Mr. Clawson meant us to load was loaded with pine crossties by some other shipper.

A thing of this kind is very provoking as well as very expensive.

We now respectfully request that you give us a reply to our letter of October 29th, and if your company do not intend to furnish the cars let us know, as we are at large expense keeping together a working force to load these cars, and others that we wish to order as soon as we know that the cars can be furnished.

Yours very truly,

AMERICAN TIE & TIMBER CO., LIMITED.

By —— ——, *Manager.*

Mr. RODGERS: I hand you a letter, dated November 7, 1907, addressed to Mr. C. B. Woods, General Agent of the K. C. S. Ry., Shreveport, Louisiana. Who is Mr. C. B. Woods?

A. He is the general freight agent of the Kansas City Southern at Shreveport at this time.

Q. Is this a copy of the letter you wrote him?

A. Yes, sir.

Mr. RODGERS: We introduce in evidence this copy of letter addressed to C. B. Woods, dated November 7, 1907, which reads as follows:

11/7/07.

Mr. C. B. Woods, General Agent, K. C. S. Ry., Shreveport, La.

DEAR SIR: Your letter of November 5th advising that your company will furnish no more tie trains for commercial ties placed on the right of way received.

Please advise us when your company will be placed in a position to furnish us cars to load ties placed on sidings, the side tracks are all blocked between Frierson and Trenton, La., and at Holly there is very little track room as your company refuse to allow loading on what they term passing track.

We have made requisition on your Chief Dispatcher, Mr.
47 Hill, for cars to be loaded at most of the station- between Frierson and Trenton, but so far have not received any cars in reply to our request.

Yours truly,

AMERICAN TIE & TIMBER CO., LTD.,
By —— ——, *Manager.*

Mr. RODGERS: Who is Mr. D. Mills?

A. He is now chief dispatcher of the Kansas City Southern at Texarkana.

Q. I hand you a telegram, dated November 25, 1907, addressed to Mr. D. Mills, signed by the American Tie & Timber Company?

A. This is a copy of a telegram I sent him.

Q. I hand you another telegram of the same date from him to you, is that a reply?

A. No, sir; that is a copy of a telegram to Mr. Hill, Chief Dispatcher at Shreveport.

Mr. RODGERS: I introduce in evidence this copy of telegram sent to D. Mills, Chief Dispatcher at Texarkana, which reads as follows:

SHREVEPORT, LA., *Nov. 25th,* 1907.

Mr. D. Mills, Chief Dispatcher, Kansas City Southern Ry. Co., Texarkana, Texas:

Please furnish us cars as follows at stations on your line in Arkansas, Ogden, three; Allene, two; Horatio, one; Neal Springs, two, to be loaded with wood railway cross ties for Union Pacific Railroad, Linwood, Kansas, on and prior to December fourth, nineteen hundred and seven, these ties were sold at eighty-six cents each, delivered on your published lumber tariff now in effect and represent a profit to us of seventeen cents each. Answer when the cars will be placed for loading.

AMERICAN TIE & TIMBER CO., LIMITED.

Q. Are the places named in this telegram loading places on the Kansas City Southern Railroad?

A. They are.

Q. Did you have ties at these stations at the time you made this demand?

A. We did.

48 Q. Accumulated for the purpose of shipping on the Union Pacific contract?

A. Yes, sir.

Mr. RODGERS: We offer in evidence this copy of telegram addressed to E. S. Hill, Chief Dispatcher of the Kansas City Southern at Shreveport, which is as follows:

SHREVEPORT, LA., *Nov. 25th*, 1907.

Mr. E. S. Hill, Chief Dispatcher, Kansas City Southern Ry. Co., Shreveport, La.:

Please furnish us cars as follows at stations on your line in Louisiana: Orangeville, one; Hawthorn, three; Leesville, one; Cooper, one; Trenton, five; Frierson, fifteen; DeSoto Switch, three; Shambergers, two; Hingston, five; Holly, fourteen; Hollingsworth, seven; Mansfield, five; Converse, three; Benson, one, to be loaded with wood railway cross ties for Union Pacific Railroad, Linwood, Kansas, on and prior to December fourth, nineteen hundred and seven, these ties were sold at eighty-six cents each, delivered on your published lumber tariff now in effect and represent a profit to us of seventeen cents each; answer when cars will be placed for loading.

AMERICAN TIE & TIMBER CO., LIMITED.

Q. Did you have ties at each of these stations sufficient to load these cars at that time?

A. I did.

Q. Ties that you had accumulated for the purpose of filling the Union Pacific contract?

A. Yes, sir.

Q. Each of these places is a loading place for ties on this road?

A. Yes, sir.

Q. Now, Mr. Marshall, before you proceed to accumulate these ties, did you—what did you do with reference to obtaining rate sheets or published tariffs of the Texas and Pacific Railway Company?

A. I wrote Mr. E. L. Sargent, General Freight Agent of the Texas and Pacific at Dallas, requesting him to furnish me tariff on lumber to various points from various points.

Q. Did you get reply to that?

A. I did not.

Q. Did you make any effort to get tariffs?

49 A. Sometimes afterwards their general agent or commercial agent at Shreveport delivered me the tariff.

Q. What is his name?

A. H. S. Hinton.

Q. What tariff did they deliver? What tariff or schedule did they deliver to you in response to your request?

A. Either this particular one or one similar to it, T. & P. 8500-H.

Q. What is that?

A. It shows rates from points in Louisiana, Texas and Arkansas,

to Arizona, Colorado, Idaho, Illinois, Indian Territory, Kansas, Iowa, Minnesota, Missouri, Montana, Nebraska, New Mexico, Oklahoma Territory, Tennessee, Utah, Wisconsin and Wyoming.

Q. This is Joint Through Tariff 8500-H, Texas and Pacific Railway Company?

A. Yes, sir.

Q. In connection with other lines that are named in it?

A. Yes, sir.

Mr. RODGERS: We introduce Tariff 8500-H, T. & P. Railway Company, and these portions of it that apply to the shipments from these stations to Linwood, Kansas.

Mr. MCCORMICK: If the Court please, we have no objection—we have certified copy of the tariff on file; we have no objection to the introduction of this as the pamphlet furnished by the Texas & Pacific Railway, but as to the question of what tariff we are bound by it is not a certified copy of the tariff and that is the best evidence, and while the Court understands we do not object to that going in as the paper we furnished in response to their inquiry.

The COURT: It is admissible in evidence.

Mr. MCCORMICK: We object to it—it is admissible only in the way I have stated.

The COURT: I will permit it to be read in evidence.

50 Mr. GLASS: I suggest that this is a great big document, and to introduce a part like Mr. Rodgers has, I think it ought to be pointed out and introduce the specific part of the record and let it go in now. To say, "We introduce the tariff and such part of it as we need," it encumbers the record and it confuses the counsel, the Court and the jury; we don't know what they are relying on.

Mr. RODGERS: We want to introduce the same portions heretofore introduced and stated here. On pages 4 (numeral lettering) to page 40, inclusive, constituting index to stations, is found Linwood, Kansas, and refers to Index No. 4417; Index No. 4417 is found on page 57, which reads as follows: "57 Union Pacific Railroad."

Under the head of "Stations to" is found Linwood, Kansas. Under the head of "Note" (Capital letters) "E. G. H." Under the head of "Route" is 11, 24, 54; under the head of "Rate" is 24, the page being headed "Rate in cents per one hundred pounds." Under the head of "Note," "E. G. H." refers to different routings, as shown on page 78. On page 78 under the head of "Routing Instructions" we find, "Route 11," reads, "via Route 10 and Kansas City, Missouri." Route 10 on same page, reads, "via Saint *St.* Louis, Iron Mountain & Southern, and Missouri Pacific Railway." Route 24, on page 78, reads, "Via Route 23 and Kansas City, Missouri." Route 23, reads, "Via M. K. & T. Ry." Route 54 on page 79, reads, "Via Route 52 and Kansas City, Missouri." Route 52, on page 79, reads, "Via Shreveport or Texarkana, and Kansas City Southern Ry."

These letters "E. H. G." refer to notes so numbered to be found on page 66. I will read Note E: "Note E. Rates apply via St. Louis, Iron Mountain & Southern Railway from Texas and Pacific Railway in Texas, Louisiana and Arkansas," also other lines not necessary to mention.

"Note G. (Found on page 67). "Rates apply via M. K. & T. Railway from Texas and Pacific Railway in Texas, Louisiana and Arkansas," also other lines not necessary to mention.

"Note H" (page 67). "Rates apply via Kansas City Southern from Texas and Pacific Railway in Texas, Louisiana and Arkansas," also other railroads named, not material.

Now, we introduce that part of the whole front page showing that this is a Joint Through Lumber Tariff and in connection with the roads named therein, and especially as to the Union Pacific
51 Railroad Company, that it was a party to this tariff and that the companies named in Notes E. G. H., Kansas City Southern, M. K. & T., St. L. I. M. & S. Ry., and applies from all their points to any point reached by any of the carriers named:

Front Page Joint Through Lumber Tariff T. & P. No. 8500-H.

I. C. C. No. 792. File for Public Inspection.

"El Paso Route."

The Texas & Pacific Railway Co.

Traffic Department.

In Connection with:

Here follows list of names of different railroads among them Kansas City Southern Ry. Co., Missouri, Kansas & Texas Ry. Co., St. Louis, Iron Mountain and Southern Ry. Co. and Union Pacific R. R.

Joint Through Lumber Tariff T. & P. No. 8500-H.

Applying on

Lumber, all Kinds (except Walnut and Cherry) Lath and Shingles, and

Articles Taking Same Rates. (See Pages 76 and 77)

Carloads, Minimum Weight, 30,000 lbs. (Except where otherwise noted),

from

Points on the Texas & Pacific Railway, also Connecting Lines in Texas, Louisiana, and Arkansas

to

Points in Arkansas, Arizona, Colorado, Idaho, Illinois, Indian Territory, Kansas, Minnesota, Missouri, Montana, Nebraska, New Mexico, Oklahoma Territory, Tennessee, Utah, Wisconsin, and Wyoming.

Effective June 1, 1901. (Except Advances June 8, 1901.)

52 Issued May 23, 1901, by:

W. F. Braggins, D. F. A., T. & P. Ry. Co., New Orleans, La.

H. L. Redfield, A. G. F. A., T. & P. Ry. Co., Dallas, Texas.

E. L. Sargent, G. F. A., T. & P. Ry. Co., Dallas, Texas.

The proper officers of the above named lines will certify to the Interstate Commerce Commission their concurrence in this issue.

To I. S. C. C. May 23, 1901. Authority No. 65310. Receipt No. 17860.

On page 2 of this tariff there is a list showing the names and addresses of the officers acting for the various railroads named in concurring in this tariff, and there is found:

E. E. Smythe, G. F. A., K. C. S. Ry., Kansas City, Mo.

W. B. Groseclose, G. F. A, M. K. & T. Ry., St. Louis, Mo.

J. C. Lincoln, G. F. A., St. L. I. M. & S. Ry.

J. A. Monroe T. M., Union Pacific R. R., Omaha, Neb.

Mr. RODGERS: Now, Mr. Marshall, at the time you wrote for this tariff, you were then manager of this company—plaintiff company?

A. American Tie & Timber Company; yes, sir.

Q. And you were getting out ties for this contract?

A. Yes, sir.

Q. Were the rates from—from stations on the Texas and Pacific road to stations—ask*ing* for in your letter?

A. Yes, sir.

Q. And in response to that Mr. Hinton, their commercial agent, delivered you 8500-H.

A. Their joint through tariff, yes.

Q. Well, in shipping oak ties, what tariff would you ask for from the railroad?

A. Lumber tariff, I understood, to commence with, I afterwards heard incidentally from some outside party that they would not handle oak ties on lumber rate. Then I wrote them as you see from the letters introduced what rates they would make on oak ties.

Q. If there was any rate at all, it would be the lumber rate, would it not?

A. That would be the logical place for it to be; I had never been in the tie business before, this was my first venture.

Q. When you asked for rates did they furnish you another tariff sheet—The Texas & Pacific Railroad?

53 A. They furnished me particular tariffs to different points; this was the only one I really had any use for.

Q. You called for through tariffs, tariffs on other lines?

A. For through tariffs.

Q. Upon what class, the same——

A. Lumber, the same class, lumber specified in this 8500-H.

Q. Did that supersede this?

A. This was the only one that named this particular point.

Q. You asked for other points because you were trying to get business at other places?

A. Yes.

Q. Now, with reference to the Kansas City Southern, did you get a joint through tariff or any kind of tariff to ship, from them?

A. Yes, I had a great many tariffs from the Kansas City Southern.

Q. Then what tariff did you get from the Kansas City Southern; from whom did you make that request?

A. I am not positive, I believe I wrote to Mr. Mitchell at Texarkana, assistant general freight agent. However, they were delivered to me by their general agent Mr. Wood.

Q. The same man this correspondence was with here?

A. Yes, sir.

Q. He is commercial agent at Shreveport?

A. He is known as general agent.

Q. What tariff did he deliver, what number, in response to your request?

A. He delivered to me the tariff covering rates from points on their line in Louisiana and Arkansas, to Linwood, Kansas.

Q. What number was that tariff, for identification?

A. I can't say, this is not the tariff here; that is not the identical tariff.

Q. Was it not 216-D?

A. It was 216-D, but I am not sure this was the one.

The COURT: It was the same tariff, but not the same pamphlet?

A. Yes, sir.

Q. It was the same tariff?

A. Yes, sir. This is it, and it is the same one.

Mr. RODGERS: Now we introduce this tariff in evidence.

54 Mr. GLASS: We object. The tariff is dated 1904, they allege we had in effect in October 1907, and in this connection we tender them a certified copy of 216-D, filed by the Interstate Commerce Commission, showing they filed also an amendment No. 49, to that tariff, which cancelled the lumber rates mentioned in the original tariff; so they had no oak lumber rate; this amendment was prepared long before this contract; we tender the original tariff showing that the rates were cancelled and a new list substituted. Your Honor ruled on that before, and the Circuit Court of Appeals says your Honor's ruling was correct.

The COURT: My ruling will be the same.

Mr. RODGERS: We introduce in evidence that part of tariff No. 216-D of the Kansas City Southern, in connection with lines marked on page 2, applying on lumber, carloads, and articles taking same rate as named on pages 26 and 27, of tariff, from points on the "Port Arthour Route" and connections shown on pages 28 to 33 inclusive, to points in Colorado, Kansas, Missouri, Nebraska, Iowa, Oklahoma Territory, Utah, South Dakota, and Wyoming, issued March 16, 1904.

We introduce the second page showing that the rates herein mentioned will apply in connection with the following lines, and among them is the Union Pacific, with which we had a contract.

In this joint tariff, "Port Arthur Route" No. 216-D, in list of stations on page 4, appears Linwood, Kansas; index number 1487; turn to 1487, page 20, we find under the head of group 5, in quotation, "Rates in cents per hundred pounds 24 cents." No. 216-D applies on lumber, carloads, as shown on page 1, and articles taking same rate, as shown on pages 26 and 27. In the list of articles tak-

ing the lumber rate, group 5, on page 26, appears "Lumber rates will apply on yellow pine, cypress, cottonwood, gum and elm lumber; also the following articles when manufactured of same, in straight or mixed carloads" now in heavy type, "except they will apply from group 5 only on lumber, all kinds (other than butternut, cherry, walnut and foreign woods of value); also on the following articles when manufactured of wood other than butternut, cherry, walnut and foreign woods of value, in straight or mixed carloads." Then mentions baseboards, bed slats, blocks, and an alphabetically arranged list of articles which we desire to introduce, but do not care to encumber the record.

55 Mr. GLASS: In order to get the record complete in this connection I would like to read a portion of the tariff which I think pertinent:

First, the title page of tariff 216-D, issued March 16, 1904, effective April 1, 1904, on lumber in carloads, from points on the "Port Arthur Route" and connections to points in Colorado. Page 26 of the tariff, giving a list of articles taking lumber rate—"Lumber rates will apply on yellow pine, cypress, cottonwood, gum and elm lumber; also the following articles when manufactured of same in straight or mixed carloads, except they will apply on lumber all kinds, other than butternut, cherry, walnut and foreign woods of value. Also on the following articles when manufactured of wood other than butternut, cherry, walnut, etc.

I want to introduce the title page of amendment number 48, issued June 16, 1907, filed July 18, 1907, which is a joint tariff applying on lumber in carloads as described herein, from stations on the Kansas City Southern and Texarkana and Fort Smith Railroad, to points in Iowa, Kansas, Missouri etc., effective August 18, 1907.

Now, in the list under the head of articles taking the lumber rates on roads, effective August 18, 1907, cancels the list of articles taking lumber rates and higher, shown on pages 26 and 27 of tariff as amended and apply [on] the following:

"Rates shown in lumber tariff as amended will apply on yellow pine, cypress, cottonwood, elm and gum lumber, and on such lumber creosoted or otherwise chemically treated; also the following articles when manufactured of same, straight or mixed carloads," and gives list of articles.

Mr. RODGERS: We would like to have the list of articles on pages 26 and 27, in both 216-D and this amendment; they had them before for comparison, and it is upon that the Court based its holding, and I think if it is a little long we had better have it in the record.

Mr. RODGERS: Now, Mr. Marshall, this joint through tariff, 216-D, we have here, is a printed tariff, issued by the railroad, is it not?

A. It is.

56 Q. A copy of the same they furnished you?

A. Yes, sir.

Q. And it is the same these excerpts we have taken from?

A. Yes, sir.

Q. Were you ever furnished at the time you made your request

for lumber tariff, with amendment No. 48 issued at the same time or a little later?

A. I was furnished with a copy of the amendment, all right.

Q. At what time were you furnished it?

A. Probably thirty days after it went into effect.

Q. It went into effect in August?

A. I probably got it at the same time I got the tariff, if that is when it went into effect.

Mr. RODGERS: If the Court please, we would like to introduce all that part of these tariffs put in the former record; that is, in printed shape and can be used on both sides, it is in shape to go in the record.

Mr. GLASS: We object to reading from the other record.

Mr. RODGERS: I just desired to use it, it is the same part.

Mr. CLARK: We introduce that part of the tariff and identified as that printed in the record. We can pick it out.

The COURT: It will be entirely agreeable to the Court if that can be done.

Mr. GLASS: They have the tariffs, I would not be captious enough to insist that they must offer it now, but I say they can look over it, they have the printed tariff, and if they find anything they want to offer later on, I shall raise no objection to it; but I do insist upon their specifying from the tariff itself the parts they desire to introduce in evidence, either do it now, or they can do it later on.

Mr. RODGERS: I tried to specify it by saying I would copy what is in the record heretofore.

57 The COURT: They object to that.

Mr. RODGERS: We can do that later on.

Mr. RODGERS: We introduce in evidence letter from E. E. Smythe, general freight agent of the Kansas City Southern Railroad, to Honorable F. M. Cockrell, of the Interstate Commerce Commission dated October 22, 1907, as follows:

Suspense "A."

OCTOBER 22ND, 1907.

A-3141.

Rates on Oak Ties, Complaint American Tie & Timber Company.

Hon. F. M. Cockrell, Commissioner, Interstate Commerce Commission, Washington, D. C.

DEAR SIR: I beg to acknowledge receipt of your favor the 7th instant relative to complaint of the American Tie & Timber Co., Ltd., Shreveport, Louisiana, having to do with the rates on oak railway crossties from points on our line to various destinations.

We were not aware that there were anything like the number of ties which complainants mention as being available for shipment—from the fact that practically every oak tie gotten out along this company's lines have been required for their own use, and we had never carried rates on oak ties from points south of Texarkana, not thinking it necessary, and for reasons above stated.

I am attaching hereto copy of my letter to Secretary Moseley on the same subject.

A few days ago, one of this company's tie contractors informed the writer personally he was away behind with his order for the K. C. S., and he would be glad to purchase every oak tie produced along its rails.

As advised in our communication next attached, we are preparing a tariff on ties from points on our own rails not taken care of, which will go [to] the printer within a few days, covering
58 rates to and from points on our line which we believe will answer all purposes.

Yours very truly,

E. E. SMYTHE,
General Freight Agent.

Mr. McCORMICK: Mr. Marshall, what was the date of the letter to the Texas & Pacific asking for lumber tariff?

A. Sometime in August, I cannot be positive as to the date.

Q. Is that as near as you can get at it?

A. Yes, sir.

Q. Who was it written to?

A. I think to Mr. Sargent, I am not positive. I think—I am pretty sure it was.

FRIDAY, *May* 6, 1910—10:00 a. m.

The defendant, The Kansas City Southern's plea of privilege was taken up and heard by the Court:

On the hearing of the plea of privilege of the defendant, Kansas City Southern Railway Company, the plaintiff, the American Tie and Timber Company, offered in evidence the following testimony:

Plaintiff introduced the original plea of privilege made by the defendant, Kansas City Southern.

Plaintiff offered in evidence page 37 of the original record in this case.

Mr. CLARK: We wish to prove by the clerk that no appeal was perfected and no writ of error was prosecuted.

Plaintiff offered in evidence brief of the defendant, Kansas City Southern, in the Circuit Court of Appeals for the purpose of showing their appearance there and showing questions raised thereby; also additional argument and also motion for rehearing and argument on that.

Mr. GLASS: Attorney for the defendant, The Kansas City Southern, testified as follows:

The plea to the jurisdiction filed in this case by the Kansas City Southern, by me as its attorney, was not taken up and acted
59 upon until the 27th day of January, 1908, it was filed on the 14 of January, 1908, but was not reached and acted on, and in fact, Messrs. Etheridge & McCormick stated, and I think that is in writing, anyway, I know that they stated that the hearing on the plea—that we would not be considered as waiving—they would not undertake to take judgment by default.

Mr. RODGERS: We object to any statement of that kind; the records are here on file and unless that is in the record, we object; the papers show when filed and when acted upon; it is a part of the records of this Court; we object to any testimony with reference to conversations of attorneys.

Mr. GLASS: The plea was not taken up and acted on until January 27; the plea was overruled and we noted an exception; and after the plea was overruled and after the Court passed on it, and after I excepted to the ruling of the Court, I filed this paper. I see that our name is signed down at the bottom here; the first I discovered that it was late in the afternoon when we got through the discussion of the case and then the paper was filed—I filed this as the original answer of the Kansas City Southern and it was not filed until after the plea had been acted upon—after the plea to the jurisdiction had been acted upon and overruled and I excepted. The file mark in the handwriting of the clerk shows it was filed January 27, 1908, and shows on its face the answer came after the overruling of the plea to the jurisdiction. The statement in the amended answer that it was filed in lieu of one filed on January 14, is just a misstatement—it is an erroneous statement. I don't know whether I am responsible for it or not. (To the clerk.) Have you got the docket showing when the answer was filed?

The CLERK: The docket shows the plea to the jurisdiction was filed January 14, 1908; the record shows the answer was filed January 27, 1908, and came after the overruling of the plea to the jurisdiction.

After extended argument on the plea to the jurisdiction, presented by the Kansas City Southern Railway Company, the Court sustained the plea, to which ruling of the Court the plaintiff then and there in open court excepted.

60 The case then proceeded against the Texas and Pacific Railway Company only.

Mr. RODGERS: We introduce in evidence a letter dated August 14, 1907, to E. L. Sargent, from E. A. Moseley, secretary of the Interstate Commerce Commission, as follows:

Interstate Commerce Commission.

Office of the Secretary.

Mc-A.

Edward A. Moseley, Secretary.

WASHINGTON, *August*, 14, 1907.

Mr. E. L. Sargent, General Freight Agent, Texas & Pacific Railway Co., Dallas, Texas.

DEAR SIR: Inclosed herewith find copy of an informal complaint made by the Blocker-Miller Company of Honey Grove, Texas, alleging unjustly discriminatory rates on red oak, gum, wil-

low, cottonwood and black oak ties from points on the Texas & Pacific Railway in Texas to Kansas City, Missouri, as compared with rates on pine ties and pine lumber from the same points of origin to the same destination.

Please send the commission such statement in regard to this complaint as you may deem proper.

Enc.

Very Respectfully,

J. A. MOSELEY, *Secretary.*

Mr. RODGERS: We introduce in evidence letter dated August 29, from E. L. Sargent to E. A. Moseley, in answer to the letter just read:

The Texas & Pacific Railway Company, Freight Traffic Department.

Notice.

All rates quoted by this company are for immediate use and are subject to change without notice, except the printing of
61 tariffs and posting of same as provided for by law.

E. L. SARGENT,
General Freight Agent.

H. L. REDFIELD,
Ass't General Freight Agent, Dallas Texas.

Mr. E. A. Moseley, Secretary Interstate Commerce Commission, Washington, D. C.

DEAR SIR: I am in receipt of your favor of the 14th inst., inclosing copy of formal complaint made by the Blocker-Miller Company, of Honey Grove, alleging unjustly discriminatory rates on red oak, gum, willow, cottonwood and black oak ties from points on the Texas & Pacific Railway in Texas, to Kansas City, Mo., as compared with the rates on pine ties and pine lumber from the same points of origin to the same destination.

I beg to advise that the question of rates on cross ties is of a very peculiar nature; owing to the fact that a railroad, to a very large extent, is dependent on the timber adjacent to its right of way for its cross ties, which as you know is a very large part of its expense for maintenance of way, the majority of lines have not considered it sound business policy to allow a low system of rates to be inaugurated on oak and cypress cross-ties, thus draining its territory of the commodity in question, believing that a company itself, through its timber contractors, were in a position to pay fair prices as other contractors, that the owners of the timber and the community at large adjacent to the seats of the tie industry, would be as much benefited as to allow outside railroads to come in and buy the supply, thus forcing the above mentioned railroad company to endeavor to get its timber supply on the line of another road which might be called a by-produce of saw-mills, and which

are now almost invariably treated by creosoting process, and oak and cypress ties which are very seldom treated, and which after a short time for seasoning are placed in the track. In all cases we have interposed no objection to our sawmills or contractors moving any amount of ties to either state or interstate destinations, but for the reasons heretofore given you, we have not felt that we should inaugurate a system of low rates on oak and cypress ties and thus deprive our company of the ties along its line for the benefit of some other railroad. There is no sentiment entering into
62 the rate situation on the commodity alluded to, but it is strictly a question of business. I believe that with the explanation, the Commission will understand the position we take, more particularly as it is not to the detriment of the community adjacent to our line owning the timber, the timber contractors getting the timber out or the workmen engaged in the labor. If any one is hurt in the slightest manner it is only the railroads who are endeavoring to drain the supply of timber which is fast becoming depleted, located on the line of our railroad to conserve their own in the future, with the prospect of an enormous rise in years to come. It is certainly a selfish position for them to take to endeavor to obtain a large share of the fast disappearing wood products on the line of another company, when in the majority of cases there are ample supplies contiguous to their own rails. It seems to me it is not a question of the reasonableness of the rate, but a commercial situation which should appeal to any fair-minded body.

Perhaps I should state that the supply of gum, willow and cottonwood lumber on our line is very small, as far as we have been able to learn; at the same time — it meet the views of the Honorable Commission, this company would be perfectly agreeable to applying the yellow pine lumber rates on ties of those woods, viz., gum, cottonwood and willow, and if the Commission will indicate that such is their wish, we will accordingly suitably amend our northbound lumber tariff, making the yellow pine lumber rates applying on ties as mentioned, effective on notice as outlined by the Commission.

Yours truly,

E. L. SARGENT,
General Freight Agent.

Mr. RODGERS: At the top of page 2, we add "there is a great difference between sawed pine ties."

Mr. RODGERS: We introduce in evidence a contract between the Texas and Pacific Railway Company and George W. Signor, dated July 13, 1905, for the purchase of ties for that road through Signor.

Mr. MCCORMICK: We object to the contract between the Texas and Pacific Railway Company and Mr. Signor, on the ground that it is a private contract between private parties and has noth-
63 ing to do with the issue in this case. The railroad company has the right to make whatever contract it sees fit for supplies—for its interest, and in making contracts it is performing its

duty to its stockholders and there is no failure of any duty to the public. The fact that it may have an interest in timber that lies adjacent to its line is not involved in any contract it might make with specific individuals to furnish it with one of its necessities.

The COURT: What is the purpose?

Mr. RODGERS: The purpose is to show that at that time the Texas and Pacific Railroad Company had an exclusive contract with Signor for eight hundred or ten hundred thousand ties a year, and he could not sell to any other railroad except with their permission. That shows the motive of the Texas and Pacific Railway Company — of the management, in refusing to apply the lumber rate to oak ties; the oak ties is the commodity we want to ship; it is the only commodity they object to shipping. Their motive was that they had an exclusive contract with a tie contractor for all the ties they needed, eight hundred thousand and ten hundred thousand ties per year, at a stipulated price, with a provision that he could not sell to any other person except with their consent; it shows they didn't want the ties moved off of their tracks at all, just as the letter to the Interstate Commerce Commission shows.

Mr. MCCORMICK: We submit, that if we did have a reason it would be entirely immaterial, because the law fixes what kind of rates we shall charge; if we don't charge that rate, if there is such a rate, and we fail to charge it we become liable. If there is no such rate, we don't have to charge. Our motive would be entirely immaterial in an inquiry of this kind. We have therefore refused to handle something we had no tariff for or we have *have* refused to handle something we did have a tariff for, and our motive would have nothing to do with the case.

Mr. RODGERS: We claim they did have a legal rate, and had a reason for not applying it.

The COURT: There is no question of exemplary damages before the Court; the Court has acted upon that; of course, if there
64 was it would be admissible. I don't consider it is admissible on the question of actual damages. At this time I will sustain the objections.

To which ruling of the Court the plaintiff excepted.

Mr. RODGERS: We introduce in evidence way-bill from Fouke, Arkansas, to Fort Worth, Texas, issued by the Texas and Pacific Railway Company, dated October 4, 1907, covering shipment of oak railroad cross ties to the M. C. Tie Company, Colorado Midland Railway, Colorado Springs, Colorado, at lumber rate, as follows:

Form 1105, Local.

The Texas & Pacific Railway Co.

Way-Bill from Fouke, Ark., to Ft. Worth, Tex.

10/4/1907.

No. Bill, 11; No. Car, 8362; Whose Car, T. & P.

(When the rates used are less than Tariff, the authority for same must be stated in the Way-Bill.)

Via —.

Consignor, M. C. Tie Co.; D. C. Consignee and Destination, Colorado Midland Ry., Colorado Springs, Colo.; c/o F. W. & D. C. Description of Articles, oak ties, S. L. & C. Weight, 40000, 59100. Rate—Through, 13; Local, 6. Freight, 7200, 8038. D. C. 204. Thu 30 2.

(Copy.)

W. Ry. Weighing Ass'n at Texarkana	900
	309
	591

Mr. RODGERS: We introduce another way-bill, from the same point to the same parties, dated October 16, 1907, covering oak ties.

Mr. GLASS: In perfecting the record in this case, I think we should make objection to that testimony, that the way-bills they introduce are not bills of lading, but way-bills, and not legiti-
65 mate evidence of whether or not there was a rate on file with the Interstate Commerce Commission on which cross ties could be moved.

The COURT: Do you propose to introduce proof upon the proposition that cross ties are not lumber.

Mr. GLASS: Yes, we propose to do that.

The COURT: That is simply the order of proof; if proof on that question is offered, I take it that the proof now offered would be relevant and competent to show what construction you placed upon your tariffs.

Mr. GLASS: I expect I was too hasty in saying that proof would be introduced; of course, that would depend, your Honor, upon what proof the plaintiff may have offered when they close their testimony. Probably I was not warranted in making that statement to the Court; if the matter was left undetermined I don't suppose we would introduce any proof; I think it fair to the Court and counsel on the other side to state that in this case—I don't think we could raise it now, but we shall at the close of the testimony take the position that this question of construction of this tariff, whether

ties are lumber or not, is a question that must formally be determined by the Interstate Commerce Commission, and while it may not be proper to say—may not be technically right to say this Court has no jurisdiction, yet under the decision of the Supreme Court of the United States as late as January of this year, that the Courts will not determine this question until they have first been submitted to and passed upon by the Interstate Commerce Commission——.

The COURT: On that question, I take it, this Court will be controlled by the ruling of the Circuit Court of Appeals.

Mr. GLASS: It would be if the Circuit Court of Appeals has passed upon it, but it was not raised and not discussed. I recognize as far as the Circuit Court of Appeals, anything that they rule upon
66 is absolutely law as far as this Court is concerned.

The COURT: I will permit the evidence; you can have your exception.

Form 1105, Local.

The Texas & Pacific Railway Co.

Way-Bill from Fouke, Ark., to Ft. Worth, Tex.

10/16/1907.

No. Bill, 40; No. Car, 550,818; Whose Car, P. C. C. St. L.

(When the rates are less than Tariff, the authority for same must be stated in the Way-Bill.)

Via—.

Consignor, M. C. Tie Co.; Consignee and Destination, Colorado Midland Ry., Colorado City, Colo., F. W. & D. C. Description of Articles, 400 F. C. oak ties, St. L. & C. Weight, 52400. Rate—Through, 13; Local, 6. Freight, 7126.

(Copy.)

W. Ry. Weighing Ass'n, Texarkana	826
	302
	524

Mr. RODGERS: We introduce in evidence way-bill from Fouke, Arkansas, to Fort Worth, Texas, dated October 17, 1907, consigned to the same parties, covering oak ties at lumber rate:

Form 1105, Local.

The Texas & Pacific Railway Co.

Way-Bill from Fouke, Ark., to Ft. Worth, Tex.

10/17/1907.

No. Bill, 42; No. Car, 9173; Whose Car, B. C. R. & N.

(When the rates used are less than Tariffs, the authority for same must be stated in the Way-Bill.)

67 Consignor, M. C. Tie Co.. Consignee and Destination, Colorado Midland Ry. Co., Colorado City, Colo., c/o F. W. & D. C. Description of Articles, 290 F. C. oak ties. Weight, 48200. Rate—Through, 13; Local, 6. Freight, 6555.

(Copy.)

W. Ry. Weighing Ass'n at Texarkana.	769
	287
	482

Mr. RODGERS: We introduce in evidence way-bill from Fouke, Arkansas, to Fort Worth, Texas, dated October 18, 1907, covering oak railway cross ties, at lumber rate:

Form 1105, Local.

The Texas & Pacific Railway Co.

Way-Bill from Fouke, Ark., to Ft. Worth, Tex

10/18/1907.

No. Bill, 44; No. Car, 4527; Whose Car, O. G. N.

(When rates used are less than Tariff, the authority for same must be stated in the Way-Bill.)

Via —.

Consignor, M. C. Tie Co.; Consignee and Destination, Colorado Midland Ry. Co.; Colorado City, Colo., c/o Ft. W. & D. C. Description of Articles, 406 F. C. oak ties, 2 cull. Weight, 65200. Rate—Through, 13; Local, 6. Freight, 8867.

(Copy.)

W. Ry. Weighing Ass'n at Texarkana.	943
	291
	652

Mr. RODGERS: We introduce in evidence way-bill from Fouke, Arkansas, to Fort Worth, Texas, dated October 17, 1907, covering carload of oak railway cross ties, shipped under the lumber
68 rate:

Form 1105, Local.

The Texas & Pacific Railway Co.

Way-Bill from Fouke, Ark., to Ft. Worth, Tex.

10/17/1907.

No. Bill, 41; No. Car, 48523; Whose Car, O. G. M.

(When the rates used are less than Tariff, the authority for same must be stated in the Way-Bill.)

Via —.

Consignor, M. C. Tie Co.; Consignee and Destination, Colorado Midland Ry. Co., Colorado City, Colo., c/o F. W. & D. C. Description of Articles, 390 F. C. oak ties, 11 cull; S. L. & C. Weight, 54800. Rate—Through, 13; Local, 6. Freight, 7453.

(Copy.)

W. Ry. Weighing Ass'n at Texarkana.	870
	322
	548

Mr. RODGERS: We introduce in evidence way-bill from Fouke, Arkansas, to Fort Worth, Texas, dated August 8, 1907, covering shipment of oak cross ties at lumber rates:

Form 1105, Local.

The Texas & Pacific Railway Co.

Way-Bill from Fouke, Ark., to Ft. Worth, Tex., 8/18/1907.

No. Bill, 22; No. Car, 158,359; Whose Car, C. C. C. & St. L.

(When rates used are less than Tariff, the authority for same must be stated in the Way-Bill.)

Via —.

Consignor, M. C. Tie Co.; Consignee and Destination, Colorado Midland Ry. Co., Colorado City, Colo., D. C. Description of Articles, 314 oak ties. Weight, 65500. Rate—Through, 13; Local, 6. Freight, 8908.

(Copy.)

69 Mr. RODGERS: We introduce in evidence a letter dated October 7, 1907, from F. M. Cockrell, Commissioner of the Interstate Commerce Commission, to E. L. Sargent, General Freight Agent of the Texas and Pacific Railway Company, at Dallars, as follows:

Martin A. Knapp, Chairman.
Judson C. Clements.
Charles A. Prouty.
Francis M. Cockrell.
Franklin M. Lane.
Edgar E. Clark.
James S. Harlan.
Edw. A. Moseley, Secretary.

A. V. S.

In Reply Address "Interstate Commerce Commission."

INTERSTATE COMMERCE COMMISSION,
WASHINGTON, *October* 7, 1907.

Mr. E. L. Sargent, General Freight Agent, Texas & Pacific Ry. Co., Dallas, Texas.

DEAR SIR: Herein I send you copy of a letter received from the American Tie & Timber Company, Limited, of Shreveport, Louisiana, dated September 30, 1907, complaining of discrimination and of refusal to transport products.

Please look into this matter and advise the Commission what your road can do or will do in the premises, and oblige,

Yours truly,

F. M. COCKRELL,
Commissioner.

(Enc.)

Mr. RODGERS: For the purpose of having the record clear, we introduce tariff 8500-H, and those parts of it that apply to the questions involved in this suit; we desire also to introduce in that connection, certified copy of the certificate of the Interstate Commerce Commission, showing it was on file with the Interstate Commerce Commission.

The COURT: You introduce what part of the tariff?

70 Mr. RODGERS: I have introduced that part of it which I denominated yesterday—referred to the different pages which the stenographer has, showing the front page of it and the front page of this joint tariff 8500-H, and the second page showing the railroad companies who joined in the making of that tariff and then the other items mentioned which we gave to the stenographer yesterday, and I think I asked in this case yesterday—I asked that the articles taking lumber rates mentioned in here be entirely included.

Mr. Marshall, Resumed.

Mr. RODGERS: Now, Mr. Marshall, I will get you to state—you stated the number of ties you got along the line of the Texas and Pacific Railway in Arkansas and Louisiana; state what the average cost per tie was of this bunch?

A. Thirty-three cents—let me look at my memorandum and I can tell you. (Refers to memorandum.) Thirty-four and three one-hundredths cents.

Q. That was the average cost per tie of those you put out on the Texas and Pacific Railway?

A. Yes, sir.

Q. That was placed along the railroad for loading?

[A.] Yes, sir.

Q. If you had shipped them, what other expense would there have been, under your contract with the Union Pacific?

A. About two cents per tie for loading.

Q. And then the freight?

A. We figure about 150 pounds to the tie.

[Q.] Which would make thirty-six cents per tie?

A. Yes, sir.

Q. 34-3/100 and two cents for loading and thirty-six for freight?

A. Yes, sir.

Q. That is 36—36-3/100 and the price was 86 cents?

A. Yes, sir.

Q. Your profit on the first-class ties would be 13-97/100 cents?

A. Yes, at these figures.

Q. What was the cost of the number two ties to you?

A. This average is made up on number one and number two ties together.

Q. What price would you have received for number two ties?

71 A. Two-thirds of the price for number 1 after deducting tha [the] freight; the approximate weight of number 2 ties is 140 pounds.

Q. Have you figured that out, how much your profit would be at the price named in the contract?

A. About 18-80/100 cents per tie on the number two.

Q. Under your contract you were permitted to ship five per cent of number 2 ties?

A. Yes, sir.

Q. That would be 7500 ties?

A. Yes, sir.

The COURT: What was the profit on second-class ties?

A. 18.80.

Mr. RODGERS: Then your total profit under that contract would be 18.80 for number 2 ties, on 7500, which you were not permitted to ship?

A. Yes, sir.

Q. And 13.97 on 142,500 number 1 ties?

A. That is correct.

Q. Have you figured that up?
A. No, my memorandum shows the ties, not the total——

Mr. GLASS: That would not be the measure of damages. He only claims in his petition that he would have shipped 60,000 ties on the Texas and Pacific. Certainly the Texas and Pacific would not be liable for what the Kansas City Southern failed to ship.

Mr. RODGERS: I am showing what was lost on the contract; we have to proportion it to the Texas and Pacific Railroad.

Q. You stated you intended to get out 60,000 on the Texas and Pacific?
A. That was our intention.
Q. Did you ship any of these 60,000 under this contract?
A. Three carloads.
Q. How many ties?
A. I don't remember the exact number, I think about 1100; it shows in your memorandum.
Q. These were shipped under this contract; these were the cars that moved?
72 A. Yes, sir.
Q. And your estimate of the profit on the ties you would have made under this contract is based upon the actual result of these ties you shipped at the 24 cent rate?
A. Yes, that we did ship.
Q. Then that left you about 58,000 and some odd ties from the Texas and Pacific?
A. Yes, sir.
Q. Under your contract?
A. Yes, sir.
Q. Independent of that 58,000, have you a memorandum of the 60,000 showing how many culls you could have?
A. No, five per cent of sixty thousand is three thousand.
Q. You could have shipped three thousand culls as number two ties?
A. Yes, sir.
Q. 57,000 number 1; now, you shipped 1033; how many of that number were number 1?
A. All number 1.
Q. You shipped 1033 all number 1?
A. Yes, sir.
Q. Now, Mr. Marshall, you put 44,000—give me that number; I have alleged 44,541, you stated a little different number yesterday?
A. 44,573.
Q. You put that many ties on the line of the Texas and Pacific? Along its line at points named to which you have testified?
A. Yes, sir.
Q. If you had been allowed to ship those, they would have gone on this contract with the Union Pacific?
A. Every one of them.
Q. At the profits you have mentioned?

A. Yes, sir.
The COURT: How many?
A. 44,573.
Mr. RODGERS: Now, how long—with reference to the ties placed along the right of way, when were these ties placed along the right of way?
A. Commencing in August, 1907, and continuing until July, 1908.
73 Q. You testified why it was strung along from January to July?
A. Yes, sir.
Q. What became of these ties?
A. They have been sold to different parties; the most of them to the I. & G. N. Railroad.
Q. At what price did you sell them?
A. Forty cents for number 1, and twenty cents for number 2.
Q. Have you a memorandum showing what you received for these ties? Along the Texas and Pacific?
A. I have.
Q. Have they all been sold?
A. Yes, all except those that are absolutely worthless, and can't be sold at all.
Q. What caused them to be worthless?
A. Exposure to the weather and flood carried off some of them.
Q. It was deterioration by reason of remaining there along the line and exposed to the weather?
A. Yes, sir.
Q. How much did you get for these ties along the Texas and Pacific?
A. $15,331.61.
Q How much would you have received for these ties if they had moved to Linwood, Kansas, under your Union Pacific contract?
A. You made up these figures, and I haven't them; what I paid and what I received for them. It is a mathematical calculation.
Q. I have it figured up; I will ask you to look at that memorandum, and refresh your memory; you made that?
A. (Refers to memorandum.) I did; I would have received from the Union Pacific under the contract $21,379.68.
Q. That is on the ties you had accumulated on the Texas and Pacific Railway?
A. Yes, sir.
The COURT: You did receive what?
A. $10,807.01.
Mr. RODGERS: A difference of?
A. $10,572.67.
74 Q. Was the price at which you sold these ties a fair and reasonable price?
A. At the time they were sold, yes.
Q. That is the total price of these ties you were able to realize at the time?
A. Yes, sir. The balance had become worthless.

Q. Now, Mr. Marshall, state whether or not the contract with the Union Pacific was cancelled, and if so when and for what reason?

A. It was cancelled by Mr. Griffith, of the Union Pacific Railroad; in a letter he stated it was cancelled because we didn't ship the requisite number of ties; he gave me this information——

Mr. GLASS: It appears it was in writing, the letter would be the best evidence.

A. I understood, however——

Mr. GLASS: We object.

The COURT: Yes, the letter would be the best evidence.

A. In December, I went to Oamha [Omaha] and called on Mr. Griffith, in his office, regarding the ties and requested that he extend the contract and give me time to get the rate situation straightened out and make shipment, and he reached in his desk and got a letter and handed it to me; I called his attention to the fact that what he stated in his letter was not sufficient cause for cancelling his contract, then he came back at me with the proposition that the rate ought not to have been——

Mr. GLASS: We object.

The COURT: I sustain the objection to the conversation.

Mr. RODGERS: I was looking at the letter and I didn't hear the ruling of the Court.

Q. You say, Mr. Marshall, you went to Omaha the date this letter was to be sent out to you?

75 A. About that date, I cannot be positive it was the 17.

Q. When you went there had you received notice of cancellation?

A. No, sir.

Q. I believe you stated Mr. Griffith gave you this letter?

A. He showed it to me and then mailed it to me.

Q. What efforts, if any, did you make to get him to rescind this action of cancellation, or permit you to ship the ties under your contract?

A. What a business man would do.

Mr. GLASS: We object to that testimony, as to what took place between him and Mr. Griffith; they allege the contract was cancelled on account of failure to ship fifteen thousand ties per month; there was no intimation that it was cancelled for any other purpose.

The COURT: There will be no evidence to that effect, did I understand you?

Mr. GLASS: There should be no other reason for cancelling the contract.

Mr. RODGERS: I might ask what efforts he made to keep them from cancelling the contract; failure to deliver 15,000 ties—what efforts he made to get them to waive that part of the contract and not cancel it, in other words, they cancelled it because he does not deliver 15,000 ties per month, which we allege we were unable to do by reason of the action of the defendant, and show we had the ties

ready; we want to show that he had attempted to get them to withdraw the cancellation he has heard of in conversation, and this letter was shown to him in that conversation; it was written apparently and was to go by mail.

The COURT: I will permit the witness to testify that he made efforts to have the Union Pacific withdraw that condition, but I do not consider that a narrative or conversation had between him and the agent of the Union Pacific Railway competent.

Mr. RODGERS: The first intimation that you had of the
76 cancellation by the Union Pacific was when you saw Mr. Griffith in Omaha and he handed you this letter?

A. A personal interview with Mr. Griffith in Omaha was my first notice, in December, 1907.

Q. During that conversation he handed you this letter cancelling that contract?

A. Yes, sir.

Q. Did you read it?

A. I did.

Q. Did you make any efforts to—did you make any objection to the cancellation by him, make any efforts to get him to withdraw the cancellation and permit you to ship ties?

A. I did everything in my power to get him to rescind the letter and let me ship what ties we had.

Q. Did he do it?

A. He said he couldn't do it, that it was beyond his power to do it.

Q. After he cancelled the contract what did you do with reference to the ties you had along the line of the Texas and Pacific Railroad?

A. I took care of them the best I could; I tried to sell them to some one else and get the most for them we possibly could?

Q. You were actively engaged in the tie business and you made efforts to sell them to whoever you could?

A. Yes, sir.

Q. And you eventually sold them to the I. & G. N.?

A. A portion of them and a portion to the Switzer Lumber Company, of Shreveport.

Mr. RODGERS: We introduce in evidence letter dated December 17, from J. W. Griffith, to the American Tie and Timber Company, at Shreveport, as follows:

Union Pacific Railroad Company.

Office of Purchasing Agent.

In reply please refer to No. 14786.
Subject: Cancellation of Ties Contract.

OMAHA, NEB., *Dec.* 17, 1907.

American Tie & Timber Company, Mr. J. J. Marshall, Manager, Shreveport, La.

DEAR SIR: Referring to the contract with your company
77 dated July 23, 1907, for 150,000 white oak cross ties, 'delivery to commence on or before October 1, 1907, and continue at the rate of 15,000 ties per month until deliveries are completed,' according to my records you have shipped to date, including bills received yesterday 7336 ties, which, as you know, is not a specific fulfillment of the contract, and the contract is void on that account.

Since that contract was made we have received hundreds of thousands of cross ties on other contracts, and now have on hand our entire requirements of cross ties for the year 1908. This letter is to notify you that we do not require the ties remaining on your contract, that we are unable to accept same, and you are requested to discontinue shipments.

Yours truly,

J. W. GRIFFITH,
Purchasing Agent.

C. C. to J. H. S.
E. C. C.

Q. Well, the ties along the line of the railroad, did the Tie and Timber Company—were you put to any expense with reference to these ties?

A. We were forced to maintain an office and guardian for them, yes.

Q. What expense were you put to—for what service?

Mr. MCCORMICK: We make objection to that testimony for the reason that we do not admit this is the proper measure of damage, and in the demurrer we allege—this has not been passed upon yet by the Court, certainly——

The COURT: You may save your point, it will be considered later; I will permit the testimony at this time.

Mr. RODGERS: What expense were you put to?

A. I have here an estimate of what the expense of taking care of the ties were. Our general expense for two years in handling ties was in the neighborhood of $10,000; I apportioned against the Texas and Pacific $3,900.00.

Q. That was for what purpose?

A. That was for the purpose of seeing that they were properly

cleared around, kept from being burned, seeing that they
78 were not carried off by other parties and used for firewood; in other words, guarding them.

Q. Guarding and protecting them from fire and from depredation?

A. Yes, sir.

Q. During—about how many ties did you have on the railroad, say the first of December, 1907, along the Texas and Pacific?

A. How many ties did I have the first of December, 1907?

Q. Yes.

A. About in the neighborhood of 25000 or *25000*.

Q. Bought, ranging from August until that date?

A. Yes, sir.

Q. When did you pay for the ties your [you] purchased and distributed along the line?

A. We paid for them as quick as we inspected them. When ties were inspected and accepted we paid for them immediately.

Q. You would buy from makers or from contractors, and they delivered them along on the railroad, along the side of the railroad, and you would inspect them and pay for them?

A. Yes, sir.

Q. Well, how long, after the ties were placed for you, under your contract, until you had inspected and paid for them?

A. When we first commenced purchasing in August, we took them as fast they were hauled out; after we got a large number of them on hand, we would delay taking sometimes forty to sixty days, sometimes three or four months; it depended entirely—some men could carry them without being paid for them by us.

Q. At the time of the cancellation of this contract, had you paid for all the ties along the Texas and Pacific road, when you—that were then delivered?

A. All of them we claimed had been paid for, we didn't put any ties on o-r records until they had been paid for.

Q. You didn't put any ties on your records until they were paid for?

A. No, sir.

Q. You say some more were delivered from that time on to July the next year?

A. Yes, sir.

Q. When were they paid for?

A. The ties bought at Fouke, Arkansas, contracted for in November and December, they were—payment was finally completed in July.

79 Q. By December first, you had paid for as many ties as you had conveniently accumulated?

A. Yes, sir.

Q. Were these ties along the Texas and Pacific, were they all sawed or hewn ties?

A. Only a few sawn ones, nearly all of them were hewn.

Q. In your contract, they could be either hewn or sawn?

A. Either hewn or sawn, yes.

Q. Were these ties such ties as specified in that Union Pacific contract?

A. Yes, sir.

Q. Accumulated for the purpose of being shipped under that contract?

A. Yes, sir.

The COURT: That was fully gone over on yesterday.

Mr. RODGERS: We want to show that we complied with the contract.

The COURT: He did that on yesterday.

Recess until 2:30 p. m.

2:30 P. M.

Mr. RODGERS: Mr. Marshall, did the American Tie & Timber Company file any formal complaint before the Interstate Commerce Commission with reference to the acts complained of by the Texas and Pacific Railroad Company, in this case.

A. No, sir.

Cross-examination.

(By Mr. MCCORMICK:)

Q. Formal complaint, Mr. Marshall, do you mean they didn't institute regular proceedings, cite the defendant to appear and answer same before the Interstate Commerce Commission?

A. No, sir; we took it up in an informal manner.

Q. You took it up by letter?

A. Yes, sir.

Q. Then there ensued between you and them and the Texas and Pacific Railroad Company the correspondence?

80 A. Yes, sir.

Q. The burden of that correspondence on your part was that there—that the tie rate was not satisfactory or that there was no rate and there should be, it was either one or the other?

A. My contention was that there was; that the lumber rate should apply on crossties.

Q. Your contention was; your contention, whatever it was, was embodied in the letter to the Interstate Commerce Commission?

—. ——.

Q. Do you know the date of that letter?

A. No, sir.

Q. Has that been introduced in evidence?

A. No, sir.

Q. Do you know where the letter is, have you a copy?

A. I think Mr. Rodgers has.

Mr. RODGERS: I have it, but I don't think I have it with me here. I went over these letters along and picked out those not introduced on the last trial.

Mr. MCCORMICK: I think we have a copy of it, sent us by the Interstate Commerce Commission.

Q. Mr. Marshall, how long has the American Tie and Timber Company been in existence?

A. Since July, 1907.

Q. Who was its managing officer from the start?

A. Mr. D. G. Petty.

Q. How long did he remain in control of the company?

A. I can't be positive as to exactly how long, possibly a month.

Q. It was under his administration that this contract with the Union Pacific was made?

A. Yes, sir.

Q. You inherited that contract when you took charge?

A. Yes, sir.

Q. Prior to the making of that contract had you ever had personally anything to do with construing rates on hewn oak crossties and what rate they would take?

A. No, sir.

Q. What business were you engaged in prior to that time?

A. I was with the Pacific Express Company.

81 Q. In that business was there any handling of ties or any transportation of ties?

A. No, sir.

Q. You were familiar with rates applicable to that business, were you?

A. Yes.

Q. Did you ever familiarize yourself with rates applicable to ties or lumber?

A. No, sir.

Q. What did the American Tie and Timber Company handle *desides* [besides] ties?

A. Lumber, ties, fence posts—never did handle any, though their charter allowed them to.

Q. It was the intention to handle these other things, was it?

A. Yes, sir.

Q. Now, what was the first step that you had to take with reference to carrying out this contract with the Union Pacific?

A. Accumulate crossties.

Q. Had you taken up with either of the railroad companies in question the question of rates applicable to ties before you begun accumulating them on their rights of way?

A. About the same time.

Q. You don't recollect whether you had begun before or not?

A. I think it was a part of the organization of the company—commenced to get ties and then found out—got rate sheets.

Q. Was the company organized on the strength of this one contract?

A. Yes, sir.

Q. Was the contract gotten before or after the organization?

A. Before; the contract was gotten before the company was chartered.

Q. Had you been associated with the company at the time the contract was made?

A. No, sir.

Q. During the time these ties accumulated along the Kansas City Southern and on the Texas and Pacific, intended for use under this contract, had you collected ties for that company on any other roads with the intention——

A. Not at that particular time; no, sir.

Q. When did you begin to collect ties on these other roads?

82 A. As soon as we found we couldn't move them from the Kansas City Southern and the Texas and Pacific.

Q. Did the same situation apply on other roads? Did they have rates on oak ties?

A. Yes, sir.

Q. What road?

A. L. & A.

Q. Louisiana and Arkansas?

A. Yes, sir.

Q. What other road?

A. L. & N. W. One runs from Stamps to Alexandria, and the L. & N. W. runs from McNeil, Arkansas, to Natchitoches, Louisiana.

Q. Was there any outlet to the general market on these roads?

A. Yes.

Q. What were they?

A. The one that went to McNeil, to Jonesboro, Arkansas, and Kansas City.

Q. What other roads?

A. That would be the Cotton Belt and Frisco to Kansas City.

Q. Did the Cotton Belt and Frisco have rates on these ties?

A. They have lumber rates. I never had the chance to test it; the contract was cancelled before I had the chance to test them.

Q. Well, it was your understanding, was it, Mr. Marshall, that this was not a settled question—that these ties were lumber and it was a matter of test—you had to test the thing out?

A. Not until after I had tried it; until I had asked the Texas and Pacific and the Kansas City Southern for rates on crossties.

Q. Did you ever confer with either lumber men or railroad men, relative to whether or not oak cross ties were lumber and took lumber rates?

A. Only with our president, who told me he had moved from the sawmill——

Mr. McCormick: We object to what your president told you. I asked about railroad men or lumber men.

A. No, sir; I never conferred with them.

83 Mr. Rodgers: Was your president a lumber man?

A. He was.

Mr. McCormick: Now, when you applied to the Texas and Pacific for rates, I mean tariffs, did you ask for tariffs on—that would cover ties?

A. No, sir; I asked for tariff on lumber.

Q. You assumed that lumber was the rate you wanted?

A. Yes, sir.

Q. You have been furnished with a copy of a letter dated Shreveport, September 14, 1907, addressed to Commercial Agent, Texas and

Pacific Railway Company, Shreveport, Louisiana, and signed by the American Tie and Timber Company, asking that they will please furnish your—you, with copy of "your Joint Lumber Tariff to points in Colorado, Nebraska, Illinois," etc. "also your local tariff between Texas and Louisiana." Did you send that letter to the Commercial (Agent) at Shreveport?

A. I presume I did, I cannot be positive.

Q. I will ask you if this is not the communication you sent when you applied for tariff on lumber shipments, and not to Mr. Sargent?

A. If you have the original letter I can testify; I expect I did write this also and one to Mr. Sargent. We looked for a copy of the letter to Mr. Sargent yesterday.

Q. Did you find it?

A. No, sir.

Q. Did you find a copy of this letter to the Commercial Agent at Shreveport?

A. No, sir.

Q. Did you look clear through your letter book?

A. I didn't have the letter book with me, I looked through the files.

Q. Well, is it not a fact that along about this time or shortly after September 14, you were furnished a tariff, No. 8500-H by Mr. Hinton?

A. I don't know whether before or after. I don't remember the time, I was furnished this tariff by Mr. Hinton.

Q. The next time you took this matter up you asked specifically for tariffs on ties, did you not; on September 24?

A. Yes, sir.

84 Q. In response to that inquiry made to Mr. Sargent, I will ask you if Mr. Hinton did not come to you and tell you personally—answer that letter personally and say that at that time the Texas and Pacific didn't have any tariff at all on oak ties, but that if you were sure that you would use the tariff they would put one in for you? Is not that a fact?

A. That is a fact, part of it, but you didn't get through with it.

Q. Tell me the whole business?

A. Mr. Hinton called on me, I can't remember the date exactly; he said if I would use the tariff providing fifty cents to some points and seventy-five cents to some points, they would put it in, provided I would use it.

Q. To Linwood, Kansas, the point under discussion?

A. I believe that was seventy-five cents, as well as I remember now; they would put in a tariff of seventy-five cents to Linwood, Kansas.

Q. He told you they had none?

A. Yes.

Q. And if you were sure the rate would be used he would put one in for you?

A. Something to that effect.

Q. Did you at that time tell Mr. Hinton that you wanted him to put it in writing—what he said, because you yourself were not in-

terested in the rate, but the Union Pacific was, and you wanted to forward the correspondence to them?

A. No, I don't believe that was the statement I made to him; I showed him the contract, or read the conditions in it, where they said if the rate was increased they would cancel the contract, and if reduced take the benefit of the reduction, I don't know that I told him I was not interested, because I was very much interested.

Q. Didn't you refer to that provision of the contract and say——

A. I say on that ground, the fact that they had the right to cancel the contract, we were very much interested; they were interested and I wanted to send it to them so they could see that I was doing everything in my power to get the ties through to them.

Q. You don't remember telling him that you were not interested?

A. No. I don't recollect telling him that, I don't believe I would have told him that, because we were very much interested.

Q. Mr. Marshall, is it not a fact that after this conversation you had with Mr. Hinton, the next step you took in the matter
85 was to take the subject up with the Interstate Commerce Commission, and that the next correspondence the general office had from—the Texas and Pacific got was direct from the Commission?

A. I don't know; I think it is. I don't know of any other. I don't recollect any other business I had with the Texas and Pacific, I think I went direct to the Commission with it, after that.

Q. Following then there was an exchange of letters between you and the Commission and the Texas and Pacific?

A. Yes, sir.

Q. And this finally resulted in the Texas and Pacific putting in a rate on crossties?

A. Yes, after my contract was cancelled.

Q. Which resulted later along?

A. No, they amended their tariff to cover crossties.

Q. This case was tried the last time—last May, a year ago?

A. No, January, a year ago.

Q. Now at this time—the time you testified before, is it not a fact that you testified that the collection of ties on the Texas and Pacific began the latter part of August, 1907, and that you ceased to deliver ties on the Texas and Pacific in January, 1908, the latter part of January, 1908.

A. I can't be positive what my testimony was the other time; that was the time we commenced and the time we—and the time we did stop taking ties was in July, 1908.

Q. That didn't happen then?

A. No, it didn't happen?

Q. In 1909 we tried the case.

—. ——.

Q. Just let me repeat a couple of questions:

"When did plaintiff begin delivering its ties along the line of the Texas and Pacific Railway?" Your answer was, "The latter part of August, 1907." About what time did plaintiff cease to deliver fur-

ther ties for shipment?" and you said, "the latter part of January, 1908." Is that true?

A. That was true according to our petition at that time; we hadn't amended our petition, which referred to a great many stations.

Q. The amendment to the petition would not change the facts?

A. Yes, it would change the facts; these stations we had named we took no more ties under that agreement. Afterwards, we amended our petition; we kept taking these ties at other points; at
86 Fouke, Kansas, we had a contract not included in the first petition. We didn't complete it there until July; we waited until the I. & G. N. men got there before we completed that contract.

Q. That contract has no reference to the contract you were seeking to fill in this case?

A. No, these ties that we accumulated—not the Union Pacific contract, and afterwards sold to the I. & G. N.

Q. You testified on direct examination, Mr. Marshall, that you had no specific number of ties to take from these people, you didn't contract a certain amount from anybody?

A. No, sir.

Q. You took all they gave you at a certain rate?

A. Yes, sir.

Q. When you found out you were not going to use the ties, why did you take any further number of ties—for instance, couldn't you have—if a man got out 10,000 ties, according to your contention he could make you take every one of them?

A. Yes, sir.

Q. If he got out a million, he could make you take them.

—. ——.

Q. You had no limit to your contract?

A. I did have—after a thorough investigation, I knew about what they could make.

Q. Had you gone over the timber they were working?

A. I was very familiar with all the timber in that country.

—. ——.

A. I moved to that section of the country when three years old; and lived there until over twenty-one, I have hunted over the whole section.

Q. Did you ever get out any ties?

A. No, sir; I have seen them and know what kind of timber there was.

Q. Did you know the capacity of the country there per acre?

A. About, yes; these particular men—these men who worked for me had worked for them.

Q. Did you have any definite understanding as to the approximate number to be furnished?

A. No.

Q. What means had you of knowing they would furnish the amount of ties that would enable you to fill your contract?

A. Knowing about the number of ties they could produce, and in order to protect myself I had my own men that were ready at any

time to go to work and put out ties, I would have gone out and manufactured the ties.

Q. At the time you testified at the last trial, I believe you
87 stated you had—at the time you found you couldn't ship these ties, accumulated something like 26,000.

A. Yes, sir.

Q. All the rest of these you accumulated was after you found out the road would not furnish cars to ship?

A. Mr. McCormick, my testimony in this case, when I testified before, I was testifying to a certain number which we alleged in our petition; I did not take in other stations, I named those particular stations at which I had ties. The other stations were not included, and therefore I did not testify as to them.

Q. These ties were all being collected for shipment on the Texas and Pacific.

A. Yes, sir.

Q. Were you not asked on the other trial how many ties you had collected along the line of the Texas and Pacific for shipments?

A. If that was the question, I was misled, because I was trying to testify to the stations we had alleged in out [our] petition.

Q. On direct examination didn't you state there was something like 26,000?

A. Had collected u pto December, yes. The first of December, I think about that time the contract was cancelled.

Q. All you accumulated after that was after the contract was cancelled, and after you has [had] notice you couldn't ship over the Texas and Pacific.

A. Yes, sir.

Q. That is, they would not accept them?

A. Yes, sir.

Q. What was the date of the cancellation of the contract?

A. December 17, 1907.

Q. When did you get notice that the Texas and Pacific had applied to the Interstate Commerce Commission for authority to put in rates on oak ties?

A. About the first of December.

Q. Did you communicate that fact to the Union Pacific that application had been made for rates and you soon would be able to begin moving them?

A. Personally to Mr. Griffith, in conversation with him, yes.

Q. Mr. Marshall, were any part of these ties sawmill ties?

A. Very few of them.

Q. How many?

A. I didn't keep any record of the amount, I would say not over five per cent.

88 Q. Was there anything like five per cent?

A. I am only guessing.

Q. How did you know any of them were?

A. Some at Caldwell's Spur, some sawn there, and some about Fouke, Arkansas, two or three little side tracks in there, all owned and controlled through Fouke office.

Q. Where were they sawn, do you know?

A. No, sir; little mills out in the country right around there.
Q. Did you actually see any of these ties?
A. I saw all from riding along on the train.
Q. Did you see any of the oak ties sawed?
A. No, I don't believe I did.
Q. Now this morning, in testifying about the ties you stated that they would weigh about 150 pounds?
A. Yes.
Q. Do you know what time they figure on the weight of a tie per foot, the dimensions of a standard tie, six by eight?
A. If you saw them green, from the sawmill, they figure six pounds; if hewn green they figure about 160 to 165 pounds; if you let them dry season, why anywhere from 145 to 155.
Q. You say six pounds, what?
Q. [A.] Six pounds per foot, that is the estimate, on green sawn ties.
Q. How many feet in a standard tie?
A. Thirty-two.
Q. That is 192 pounds?
A. Yes, about that.
Q. That is 192 pounds for a green tie of standard measurement?
A. That is what they figure, but they hardly ever get that much.
Q. A tie that does not give that much, is not full up to the measurement?
A. It depends on how much heart timber; if the timber is heart it will go down as low as five pounds; if considerable sap, will weigh more.
Q. Sap weighs more?
A. Yes, on account of the water in it.
Q. These ties you wer- [were] getting out, this timber, they were practically all green, were they not?
A. No, there were a good many of them dry. We bought them, this first installment, a good many of them had been made two or three months.
89 Q. How much does it weigh,—how much less in drying out?
A. A hewn tie will go down as low as 145 pounds.
Q. Loses fifty pounds in weight?
A. That is the estimate on them. I can testify that we did ship last month, the firm I am with now, 30,000 that average 146½ pounds, and were accepted under the same kind of contract.
Q. What kind of wood?
A. White oak crossties, that had been seasoned 18 months.
Q. These ties you had, none of them reached any such age as that?
A. Some of them got to be over two years old before we moved them.
Q. I mean from the time you tried to ship them, till the time you got them out?
A. The ties that were really shipped——
Q. The time they would have moved?

A. The ties that really moved to the Union Pacific averaged 158 pounds to the tie; you can see from that about how they would——

Q. When did you take that weight of them?

A. They were shipped in December after getting the weights from the expense bills furnished by the Union Pacific Railroad along in March.

Q. They averaged 158 pounds?

A. Yes.

Q. What was the basis you figured on this morning when you were applying the rate——

A. 150 pounds.

Q. Well, say that you were eight pounds lower than the actual facts would make your estimate— —

A. Yes, you understand we were accumulating ties in order to have then on hand more than fifteen thousand a month, in order to get the benefit of the shrinkage.

Q. But as a matter of fact the dates they had been there—you shipped them out in the conditon they were in in order to comply with your contract of fifteen thousand per month?

A. Yes, sir.

Q. It was necessary to ship most of them green?

A. No, sir; not necessarily; the testimony shows we had enough to ship fifteen thousand per month and hold some for seasoning; thereby shipping old ties.

Q. You had 26,000 on the Texas and Pacific? You expected to ship 60,000 off the Texas and Pacific?

90 A. Yes, sir.

Q. You ordered cars for how many—the cars you ordered from the T. & P. on November 25, how many cars did you order?

A. I don't remember exactly, they were to move about twelve thousand ties.

Q. They would have moved that many?

A. About that many.

Q. Did you intend to move as many as twelve thousand? Did you intend to move as many as twelve thousand per month from the T. & P.?

A. I was going to even the thing up as much as possible in order to get the contract filled with the least trouble. The estimate we made of what we would ship from one road or the other was simply an estimate. It might be we could not do so; might have a strike on the Kansas City Southern and be forced to——

Q. You didn't make any average of the weight of these ties except those you shipped?

A. Those are the only ones.

Q. Those averaged 158 pounds?

A. Yes, sir.

Q. So, that there were eight cents—eight pounds difference?

A. Yes, sir.

Q. That would be above your estimate and make your rate heavier to Kansas City than you figured?

A. Yes, sir.

Q How many men did you—did you get permission of the Kan-

sas City Southern and the Texas and Pacific to place ties along their right of ways?

A. No, sir.

Q. Where were these ties placed?

A. On the right of way at their stations, where they receive from everybody else.

Q. Did you consult with anybody else about putting them there?

A. No, sir.

Q. Put them there of your own motion?

A. Yes, sir.

Q. How many men did you have employed at different places watching these ties, what did they do? During the time the ties lay there?

A. You men how many men did I have guarding them or making them? I only had one foreman traveling around looking after them. He didn't stay at the station.

Q. You had one foreman?

91 A. Yes, sir.

Q. How long was he engaged in this work, up to the time you finally got rid of the ties?

A. From December 17—December 20, the last car was shipped until February, 1910; December, 1907 to February, 1910.

Q. You mean you just this year got rid of him?

A. The ties at Brand Bayou moved in February, 1910.

Q. You didn't have ties enough to keep one man busy all that time?

A. We had to have a man look after them if we only had five hundred.

Q. How much did you pay him?

A. $100 per month and expenses.

Q. What other work was he doing besides guarding these ties?

A. Looking after shipping out ties to the I. & G. N. on their contract.

Q. That was the total salary paid?

A. $100 per month and traveling expenses.

Q. What per cent. of his time was occupied attending to your business, shipping and things of that sort?

A. Well, if it hadn't been for this, it would not have been necessary to have had him at all.

Q. Somebody had to get out the ties?

A. I could have done that myself and done this work besides; I maintained an office in Shreveport and there was my salary and his salary and stenographer to pay.

Q. Did the American Tie and Timber Company organize simply for the purpose of this one contract, and as soon as it was finished abandon the field?

A. No, sir.

Q. Is the company in existence to-day?

A. Yes, sir.

Q. Is it doing any business?

A. No, sir; it is in liquidation.

Q. Has it ever attempted to do any other business besides getting rid of these ties?

A. Yes.

Q. Has it done any other business?

A. Yes; I have already testified we sold the I. & G. N. 100,000 from the Texas and Pacific road.

Q. Was not that the same?

A. We took the old contract, I had to move these old ties and had to take more in order to get these off.

Q. Have you figured to see what—whether there would be
92 any difference in what you would get if you figured 158 pounds instead of 150, and then compare that with what you got from the I. & G. N.?

A. I figured what I would have gotten from the Union Pacific.

Q. Paying a freight rate based on 158 instead of 150 pounds?

A. No, sir.

Q. You have not figured that?

A. No, sir; I figured 150 pounds.

Q. Now, is it not a fact that these ties of yours were piled along the road by inexperienced hands in a great many instances and the inspectors sent down there by the Union Pacific refused to take the ties?

A. No, sir; the Union Pacific refused to take some, because they were piled so they couldn't see them; the understanding was they were to inspect the ties as they were loaded; we got them to send a man—let a man inspect them in piles.

Q. Is it not a fact that your ties were piled in low piles and scattered around?

A. Our ties were piled in the same manner ties are always piled.

Q. What per cent. of the ties along the Texas & Pacific railway were first-class ties and what per cent. were second-class?

A. There were about 90 per cent. and 10 per cent.—10 per cent. second and 90 per cent. first-class.

Q. According to your contract with the Union Pacific you couldn't deliver but five per cent. of the second-class?

A. That is as many as they would take under the contract.

Q. That other five per cent. was included in the number of ties on which you figured; you figured both as to your profits and as to the freight and cost of moving them?

A. Yes, yes.

Q. So corectly figured that five per cent. should be deducted from all that—both from profits and from the freight?

A. No; it should not be deducted, because the chances are we could sell them at as good profit as the other.

Q. The chances were what?

A. That I could sell these ties for about the same profit?

Q. I thought you stated that your failure to get cars prevented you selling any of them?

A. Had they allowed me to move them, I could have gotten
93 the same price.

Q. You couldn't sell the ones you had and they would have been unacceptable under the contract?

A. Yes, sir; no, sir.
Q. How could you have sold the others?
A. I say the chances are I could have, if I had been permitted to move them.
Q. On what do you base that opinion, what facts justify the expectation on your part?
A. No. 2 could be bought and shipped and there is always a limited market for Number 2 Ties.
Q. Always a market at this point?
A. I afterwards sold the greater number of these ties to another road running into Kansas.
Q. After the rates were put in?
—. ——.
Q. After the rate was put in you sold all these ties, you say?
A. Yes, sir.
Q. But not at figures you contracted with the Union Pacific?
A. No, sir.
Q. Did you sell all of the ties along the Texas and Pacific to the I. & G. N.?
A. No, sir.
Q. Who else did you sell to?
A. To the Switzer Lumber Company, f. o. b. Kansas City.
Q. What did that net you per tie?
A. About twenty-three cents.
Q. That first or seconds?
A. Seconds? No; they netted me about ten cents. They cost me about 13 and I realized twenty-three.
Q. That made a net profit of ten cents?
A. About ten cents.
Q. How many were there?
A. I don't remember the exact number.
Q. You have a memorandum showing, have you?
A. Yes, sir; 1950 from Marthaville; 638 from Powhattan; these are all I sold to the Switzer Lumber Company.
Q. Did you sell any to anybody else?
A. Yes; I sold the Signor Tie Company some.
Q. What did you get, you say they netted you ten cents?
A. Yes, sir.
Q. How many did you sell Signor?
A. I sold them at S. & G. Spur, 265, at 15 cents; 1,192, at 35 cents.
Q. These others were at sixteen?
94 A. Fifteen. They were about 143 culls and 1,314 was first-class.
Q. That is all you sold to the Signor Tie Company?
A. I think that is all they got on the Texas and Pacific. Yes; I sold him a number on the Kansas City Southern.
Q. What did Mr. Signor offer you for the ties?
A. I think they offered me 32 cents for the first-class and didn't want the seconds, though I am not positive about that.
Q. Is it not a fact that he offered you forty-five cents?

A. No; he never did, if he had he would have had them any time.

Q. You sold them to the I. & G. N. for 45 cents?

A. I sold them to the I. & G. N. for 40 and 20.

Q. Forty, first-class, and 20, second-class.

A. Forty for first-class, and 20 for second; yes.

Q. Mr. Marshall, did you testify on the former trial that he offered you forty-five cents and you refused to take it?

A. No, sir.

Q. May be it was forty; did you testify he offered you forty?

A. No, sir.

Q. I don't recollect that?

A. I didn't testify that, he never did offer that.

Q. Did all of the balance of these ties go to the I. & G. N.?

A. All except what is left on hand down there now, not fit for anything.

Q. You have had rates on oak ties ever since the 13 day of February, 1908?

A. Yes; about that.

Q. All the roads down in that territory have got them in now?

A. Yes; all except the Kansas City Southern?

Q. What has been the prevailing price of ties, of standard ties, first and second-class, since these rates have gone into effect at these Louisiana points?

Mr. RODGERS: We object, it is immaterial.

The COURT: That is not on the question of the measure of your damages as far as an answer to the breach of your contract with the Union Pacific is concerned.

Mr. MCCORMICK: It might show what the market value of
95 ties in his locality was, it might show that he didn't suffer any damages.

The COURT: It is material along that line.

The WITNESS: Forty cents for Number 1, and 20 cents for No. 2, is about the standard price.

Q. That has been the prevailing price after the rates have gone into effect?

A. Yes, sir.

Q. Do you recollect what the prevailing price of these grades were prior to the time these rates went into effect?

A. You mean what we paid for them along at the different stations? What we bought them from the producer for?

Q. What was the market value of them for that commodity, did they have a market value?

A. The market value I sold to the Union Pacific was about fifty cents apiece.

Q. The market value was higher before then, than after?

A. Yes; ties were largely—in greater demand at that time.

Mr. McCORMICK: There is a matter Judge Glass would like to examine him upon.

Mr. GLASS: The Kansas City Southern is out of it; this relates to the defenses of the Texas and Pacific.

The COURT: Go ahead.

Mr. GLASS: Mr. Marshall, you stated this morning that Mr. Hinton came to you about the shipment of these ties and informed you that they had no rates, that was in October, 1907.

A. I don't remember the exact date, Mr. Glass, he informed me—he gave me that information at the same time, about the time I started in business.

Q. You stated you wanted to keep the Union Pacific powers
96 advised, and that was why you wanted it?

A. I don't know whether that was my statement to him or not.

Q. You stated you did want to keep the Union Pacific advised?

A. Yes, sir.

Q. You did, as a matter of fact, keep them advised as to the reason you couldn't ship?

A. They had an inspector right with me; he kept them—

Q. You knew the Union Pacific was advised about that all along?

A. Yes, sir.

Q. Then, along in October and November they knew you were not able to ship out the ties at the rate of fifteen thousand per month on account of the trouble you were having with the rates?

A. Yes, sir.

Q. Now, early in December on the two roads you had about how many ties?

A. About seventy-five thousand.

Q. About seventy-five thousand?

A. Yes, sir.

Q. How many of these were culls or seconds?

A. I would say about ten per cent., I don't remember exactly.

Q. You wrote Mr. Griffith along about December 2, in which you told him you now had gotten the matter straightened out so shipments would be resumed and you had seventy-five thousand out ready to ship?

A. I don't remember exactly what I wrote. I wrote something to that effect.

Q. In that letter didn't you tell him that all contractors in this country accept about fifteen per cent. of second-class ties and you had been forced to accept the same amount and asked him to allow you to ship them?

A. I don't know that I went into the number as to exact numbers; I was getting more number two ties than his contract called, and I wanted to get him to take all of them if I could.

Mr. RODGERS: We object; that is a matter that is not pleaded by the Texas and Pacific, it was by the Kansas City Southern. We renew our objection to this, the Kansas City Southern is out.

97 Mr. GLASS: It is a question, what was the cause of the injury—whether or not the Texas and Pacific failed to ship ties

at the time tendered. That depends on whether or not the Union Pacific could cancel the contract at the time they did.

The COURT: I don't follow you.

Mr. GLASS: This contract was canceled by the Union Pacific Company and the cancellation was concurred in by the American Tie and Timber Company, because they thought the Union Pacific could do so. Now, if they did not have the right to cancel the contract at the time they did, or if they had affirmed the contract after they had notice that the ties were not being shipped fast as the contract called for, then the wrongful cancellation of the contract was the proximate cause of the injury and not the action of the railroad company for something that had been done prior to that time.

The COURT: What was the question?

Mr. GLASS: The question I was seeking to—it is documentary, really; the question I am seeking to establish by this line of proof is that——

The COURT: What was the immediate question to which objection was urged?

Mr. GLASS: I started to ask if he had a letter dated December 11 which he received from Mr. Griffith of the Union Pacific Railroad Company, in reply to one he says he wrote. I asked about a letter of December 7, to Mr. Griffith, in which he asked him to take fifteen per cent. of second-class ties, and told him he had seventy-five thousand on hand and he had about gotten the rate qeustion straightened out. Now, I want to see that letter Mr. Griffith wrote him in reply.

The COURT: I overrule the objection.

98 Mr. RODGERS: I object to the line of testimony.

Mr. GLASS: Have you the letter?

A. No, sir.

Q. You did receive a letter from him?

A. Yes, sir.

Q. Where is the letter, at Shreveport?

A. I am not positive whether it is in the file with our attorneys or whether it is in my file at home.

Q. Will you look through your file when you get through?

A. Yes, sir.

Q. Now, this letter from Mr. Griffith, you got that about what time, do you remember?

A. No, sir.

Q. Do you remember it was dated December 11.

A. No, sir; I don't remember the date of it.

Q. Did Mr. Griffith tell you or write you he would not change the contract and that the number of second-class ties must be limited to five per cent. as agreed upon?

Mr. RODGERS: We object to parole testimony; we have had no notice to produce. They have deposition with letters on file in this case.

The COURT: If the objection is urged, I sustain the objection on the ground that no motion to produce——

Mr. GLASS: The witness stated he would ascertain if he had it; we will skip that for the present.

Q. After you went to Omaha and saw Mr. Gritflih, December 17, how long before you had seen him, how long had it been since you had seen him when you saw him December 17?

A. I am not positive, I believe that is the first time I ever saw him.

Q. After this time after he gave you this letter that has been read in evidence, dated December 17, did he agree to take about 20 car loads of ties you had already inspected?

A. He agreed to take all I had loaded.

99 Q. That was about 20 car loads?

A. Somewhere in that neighborhood.

Q. That agreement was made after you showed him that letter?

A. Yes, sir.

Q. You had commenced to ship December 5, on the Kansas City Southern?

A. Yes, sir.

Q. On a rate of twenty-three cents to Kansas City?

A. I consigned them to Linwood, Kansas, and still contend for a rate of 24 cents.

Q. The Kansas City Southern did have a rate that went in December 5?

A. Yes; a local rate to Kansas City.

Q. That road refused to put in a rate from its line to the Union Pacific?

A. They refused to allow the lumber rate to obtain.

Q. You commenced to ship ties December 5?

A. That was the first day they would accept any from us.

Q. You shipped several car loads right along?

A. Shipped all I could load.

Q. Up to December 17 you had loaded something like ten or twelve thousand or more, hadn't you, something like thirteen thousand?

A. Ten or eleven—not up to December 17; while I was gone to Omaha the men were still loading ties.

Q. About how many did you have on the Kansas City Southern?

A. Thirty or thirty-five thousand.

Q. There would be no trouble for you to continue shipping ties if the Union Pacific hadn't canceled the contract? If you had kept on, inside of ten months you could have put out 150,000?

A. Yes, sir.

Q. You would if they hadn't canceled the contract?

A. Yes, sir.

Redirect examination.

By Mr. RODGERS:

Q. Since December 5, when the amendment went into effect, you commenced loading ties?

A. Yes, sir.

Q. During that time until the time of the cancellation of the contract you accumulated about thirty cars and loaded on the Kansas City Southern?

100 A. I think so, something along there.

Q. After the cancellation of this contract by the Union Pacific, Mr. Griffith agreed to take the ties that you had already loaded on cars?

A. Yes, sir.

Q. That was all?

A. Yes; and that would be loaded until I could stop my men.

Q. Until you could reach them?

A. Yes.

Q. He took these separate and distinct from the contract?

A. He took them to apply on the contract.

Q. You mean he took them at the same rates?

A. Yes, sir.

Q. The contract was canceled?

A. Yes, sir.

Mr. GLASS: How far is it from Kansas City to Linwood?

A. Fifteen or twenty miles.

Q. The Union Pacific runs from Kansas City to Linwood?

A. Yes; that is, I think they do. I have never been there, judging from the map that is about it.

Mr. ROGERS: You stated you could furnish 150,000 from the Kansas City Southern regardless of the Texas and Pacific, if the rate of December 5——

A. Did I, I didn't intend to say so.

Q. That is the question I understood you to answer?

A. The question was, could I have completed the contract, having in mind the Texas and Pacific rate, along in the spring of 1908, had the Union Pacific accepted the ties at twenty-three cent rate to Kansas City; had these conditions obtained I could have filled the contract on time.

Q. In other words you could have completed your contract after December 5, if the Kansas City Southern had maintained a twenty-three cent rate and the Union Pacific had been willing to take them at that rate?

A. Yes, sir.

Q. And the T. & P. had put in the rate they did put in in February, 1908?

A. Yes, sir.

Q. In other words, these conditions, if your contract had not been cancelled, you could have fulfilled——

101 A. Yes; without the least trouble.

Q. The Kansas City Southern never has put in a joint through rate?

A. I have never been notified of one.

Q. Refused to do it at that time?

A. Yes, sir.

Q. They put in a rate over its own rails?

A. Yes, sir.

Q. You testified with reference to the weight of ties and accumulating ties to get the benefit of their seasoning. The rate of freight was based on cents per hundred pounds?

A. Yes, sir.

Q. Every pound that was taken away from a tie by seasoning, was a profit to the tie company?

A. Yes, sir.

Q. Then, you were interested in accumulating ties and let them season to a certain extent before shipping at all?

A. Yes, sir.

The COURT: He has testified to all that.

Mr. ROGERS: With reference to the testimony of the call of Mr. Hinton when he offered to give you a seventy-five cent rate; was that seventy-five cents per tie or seventy-five cents per hundred pounds?

A. I don't think he stated; all their rates had been quoted by the hundred pounds. I took it to mean per hundred.

Q. Now, with reference to whether or not you consulted the Texas and Pacific Railway Company before you put ties on its right of way at these loading stations, the custom of the road is that any one having ties can put them on there?

A. That was my understanding and I have never heard of their objecting.

Q. It was done down there?

A. Yes.

Q. Any one having ties put them on the right of way where they can be loaded?

A. Yes, sir.

162 W. F. STERLEY, a witness for the plaintiff, being duly sworn, testified as follows:

By Mr. ROGERS:

Q. What is your name?

A. W. F. Sterley.

Q. What is your occupation, Mr. Sterley?

A. General Freight Agent of the Fort Worth and Denver.

Q. Where is your headquarters?

A. Fort Worth.

Q. How long have you occupied that position?

A. About eight years.

Q. Are you familiar with the traffic sheets, tariffs?

A. Reasonably, so.

Q. Joint rates?

A. Yes, sir.

Q. I will ask you to state whether or not the Fort Worth and Denver handles crossties upon lumber tariff rates?

A. Without being specified, we do not.

Q. Don't you accept when tendered to you by other roads any lumber billed?

A. Not unless the tariff so specifies.

Q. Not unless the tariff so specifies. Don't you accept them if billed to you by another road—another carrier, under the lumber tariff? Don't you carry them just the same?

A. If they are included—incorporated among the items taking lumber rates or described as lumber in tariff, then we treat them as lumber or rather we treat them as crossties, but carry them on lumber rates.

Q. Your road handled some crossties along in 1907, going to Colorado Midland, Colorado City and Fort Worth and Denver, they were handled under a lumber rate then in force, were they not?

A. I cannot say. This (referring to way-bill) does not indicate what the through rate was or what the tariff rate was; this is simply the proportion accruing to the Texas and Pacific up to Fort Worth.

Q. Well, didn't you know at that time that the Texas and Pacific had no rate in effect specifying crossties, nothing but a joint lumber rate?

A. I did not.

Q. Then, you don't testify that your company would not handle them unless it was in the rate sheet?

A. I testify that unless it was in the rate sheet that cross
103 ties would not be treated as lumber; as an example, we had a rate published——

Q. I didn't ask you for examples, you answer my questions, would you handle base boards?

A. If—I think we would if they were included as lumber and they are lumber.

Q. Don't you handle scantlings, 2x4?

A. Yes, sir.

Q. 2 x 8?

A. Yes.

Q. 4 x 4?

A. Yes.

[Q.] Beams?

A. What kind of beams, not bridge timbers.

Q. I am talking about bridge timbers?

A. That would be a beam.

Q. What do you call bridge timber?

A. Material, 6x12 or 14x16.

Q. Is not that used for that purpose, too?

A. Not that I know of.

Q. You mean to say that you would not transport a 6x12 or 14 building material under your lumber tariff—under your lumber rate?

A. I would not transport cars—car sills; they are 6x8.

Q. Why would you not?

A. 6x8x34.

Q. You would handle any kind of building material that comes under the head of lumber, would you not?

A. Lumber is defined in the tariffs and whatever that definition may be, would be considered as lumber.

Q. It is defined in the tariff?

A. Yes.

Q. If you have a tariff "lumber, all kinds," that means all kinds of lumber?

A. Yes.

Cross-examination.

By Mr. McCORMICK:

Q. If you have a tariff—joint lumber tariff includes "Lumber all Kinds" except certain specified kinds, like butternut, walnut, cherry and that tariff also later on provides that they carry certain articles named and enumerated in a list, and you don't find enumerated in that list [of] oak crossties, would you consider
104 that tariff covered oak crossties?

Mr. RODGERS: We object; the tariff is here and speaks for itself. What he considers is on a hypothetical question; the tariff undisputed is in evidence and we object to that testimony.

Mr. McCORMICK: I understand that is what the Court of Appeals says we have to develop and submit to the jury.

The COURT: I should like to read the opinion of the Court of Appeals.

(The Court reads opinion of the Circuit Court of Appeals in this case.)

The COURT: Repeat the question.

Mr. McCORMICK: If you had a joint lumber tariff providing that covered lumber, all kinds except butternut, cherry and walnut and foreign woods of value, and further providing that it should apply to certain enumerated lists of articles named, base-boards, doors and things of that sort, not naming railroad crossties and railroad crossties were offered to you on that tariff, would you accept them?

A. No, sir.

Mr. RODGERS: We object. The opinion of the Court is, as I understand it, that those things constitute lumber. The Interstate Commerce Commission which the Supreme Court of the United States says is authority in this matter, has held that ties are lumber and take the lumber rate. If they file a tariff and specify that as a separate commodity, there is no objection on the part of the commission, but they must have same rate, neither higher nor lower, because that is the class to which they belong.

The COURT: I will sustain the objection to the question as put.

Mr. McCORMICK: I just want to understand the ruling of the Court. My understanding of the decision of the Court of
105 Appeals in this case is not that ties are lumber or ties are not lumber, they cite some of the holdings of the Interstate Commerce Commission that indicates that possibly they should have taken the same rate——

The COURT: I sustain the objection as put by counsel.
Mr. MCCORMICK: Mr. Sterly, are hewn railroad ties, lumber?

Mr. RODGERS: We object. It is a question—it is not a question of difference. It is not a question of whether hewn ties are lumber any more than sawn ties. The dictionary says lumber is hewn or sawn; it makes no difference whether by wedge and maul or by machinery, and what Mr. Sterly might consider could not possibly be competent evidence in this case or any other case. It don't make any difference whether hewn or sawn, it is lumber. That is what the opinion says; they quote with approval the Courts of Wisconsin and Maine and Oregon, and the dictionary's definition of lumber.

Mr. GLASS: We had a case—a Missouri case in the other case holding that crossties were not lumber. Now, the Circuit Court of appeals simply holds that it was error to hold that as a matter of law, and cited some decisions as giving an example, but none of them held that crossties are lumber as I remember it; they cite some decisions holding them something that is kindred, hewn or sawn or something of that kind——

The COURT: I sustain the objection as put.
Mr. GLASS: We except.

Mr. MCCORMICK: How long have you been in the traffic business, Mr. Sterley?
A. Something like—nearly twenty years.
Q. Have you had experience in making and considering tariffs applicable to lumber, ties and things of that kind?
A. Yes, sir.
Q. Has your experience in that respect been a guide by
106 which the company you worked for operated in determining this question?
A. Yes, sir.
Q. These decisions have been accepted by your company?

Plaintiff objected.

Q. That has been accepted by your company?
A. Yes, sir.

The COURT: I will permit you to put the questions qualifying him to speak.

Mr. MCCORMICK: Would you say you are qualified to say this matter as determined among traffic men, where any specific article comes within a general tariff?
A. Yes, sir.
Q. From your experience in such matters, making and handling and considering tariffs and shipping lumber and ties, would you say ties come under lumber tariffs unless specifically mentioned?

Mr. RODGERS: We object; because the tariff is here and speaks for itself.
The COURT: The tariff is here, but it must be considered.
Mr. RODGERS: We think it cannot be considered in any way that will change its verbiage—its plain verbiage. There is no ambiguity

about the tariff. It says, "Lumber, all kinds, except butternut, walnut."

The COURT: I will permit the question.

Mr. RODGERS: We except.

Mr. STERLEY: Will you state that again?

107 Mr. MCCORMICK: If there is a tariff—I mean in view of your experience in construing tariffs, if you had submitted to you such a tariff as this Texas and Pacific Joint Lumber Tariff, which covers lumber, all kinds, except those three kinds and valuable woods, and does not specifically include hewn or sawn oak railway cross ties, would you consider that those articles came with that tariff?

A. No.

Mr. RODGERS: I want to renew my objection to the form of the question.

The COURT: I take it that it is the same form of question which I ruled on. Go ahead.

Mr. MCCORMICK: What did you say about it?

WITNESS: I said no. I would not.

Mr. RODGERS: Would you accept a shipment where the rate on crossties being specified as a commodity, was a higher rate than the rate on lumber?

A. We would accept it under that commodity rate yes.

Q. Ship and transport it?

A. Yes.

Q. Would you accept a rate on ties as a specific commodity if it was lower than the rate on lumber?

A. If we had a lower rate published or a rate published on a specific commodity, we certainly would accept it.

Q. Do you sometimes make a rate on ties higher than the lumber rate?

A. Not that I know of.

Q. Do you make them lower?

A. I have known them to be lower for many years.

Q. You don't make them higher?

A. I don't recollect a case.

Q. Oak lumber rates and oak tie rates are the same?

A. No: not necessarily.

Q. What are they—which one is the highest?

A. Oak is usually higher——

108 Q. Oak lumber rate and oak tie rate is the same, is it not?

A. Not unless you specify it; unless you specify oak ties in the tariff providing rates on oak lumber, I should not apply oak ties any more than I would on wagon axles or hounds in the rough.

Q. You apply it on any other kind of oak lumber, would you not? You ordinarily apply the oak lumber rate on any kind of lumber?

A. Yes: a commodity regarded by the trade as lumber is lumber.

Q. By the trade? Railroad ties—railroads, they are the only ones who use them?

A. No.

Q. Practically?

A. No; a great many industries use oak, for instance——

Q. I mean oak ties?

A. O, oak ties. Street car companies—yes; I believe the railroads use the majority of them.

Q. I will ask you if under a tariff promulgated—joint through lumber tariff, on lumber, all kinds, except certain named woods, on any character of lumber, should properly be transported under that tariff, anything that comes within the definition of lumber?

A. Well, defines all lumber and a great many other commodities on which——

Q. I am talking about anything that comes within the definition of lumber?

A. No, sir; what do you mean by defined as lumber?

Q. As defined by the dictionary, by the dictionary of standard works; as accepted by the American people?

A. The dictionary is not one of the publications on file with agents and a great many of them, I doubt seriously whether a great many of them own one.

Q. In making up rate sheets you don't think you are bound by the common definition of the word?

A. No, sir; it is the trade——

Q. You put your own secret construction upon a word and that goes?

A. No; not necessarily that; it is the trade that governs the trade definition.

Q. Is there any difference between the trade definition as to whether this word asked in here—it is oak lumber, we will say—any way, that will come under the lumber rate?

A. Yes.

109 Q. And was what?

A. It might be oak lumber, but not necessarily the same as pine or maple.

Q. It would come under the lumber rate if it was a tariff on lumber, all kinds, except butternut, walnut and cherry?

A. Yes; unless you should regard that as moulding. Part of this might and part of it would not; unless moulding was designated as taking the lumber rate.

Q. Moulding is lumber?

A. It is manufactured to a greater extent than this other. (Indicating).

Q. Both are dressed by machinery?

A. That is true, but the other is dressed to a greater extent.

Q. Then, you define lumber by greater degrees of dressing? Take oak, choice oak scantling, that is lumber?

A. Yes; oak lumber.

Q. Regardless of length; this finished work is oak lumber in the tariff; oak lumber, all kinds; lumber, all kinds, it would be transported——

A. If you wanted to buy lumber or wanted to buy this particular thing, they would not sell it to you as lumber, they would sell it to

you as moulding. Traffic men try to keep abreast with freight conditions and tariff and classifications.

Q. They would sell me that board as lumber?

A. Yes.

Q. That would be transported?

A. Yes, sir.

Q. Or a rough piece?

A. Yes.

Q. No difference, same rate—same way with pine?

No answer.

Mr. CLARK: In the hypothetical case put to you by Mr. McCormick as to the lumber tariff, lumber being a general commodity, excepting cherry, walnut, butternut and woods of value, and then specifying a list of commodities; now, if you don't find in that special list sawed oak posts for wire fence, would you classify sawed post for wire fence if they are not found in the list, under the head of lumber?

A. I wo'd [would] in that case, because we described it as lumber.

110 Q. How -ould [would] you differentiate sawed posts for wire fencing and a piece of timber sawed square to be used for some other purpose, viz., crossties?

A. There might——

Q. Is there any substantial difference?

A. No; no substantial difference.

Q. Now, you don't make any difference between posts for wire fence where it is sawed in a mill or whether it is—whether some country fellow takes an axe and makes——

A. If you saw sawed, we would confine it to the rate—we should confine the rate to the sawed posts.

Q. I am speaking now in reference—I am not speaking now of your custom, I am speaking now as to the question of lumber, your opinion on the question of lumber; here is a pile of posts for wire fencing, a thousand of them, they have been hewn out with an axe; here is a thousand that have been sawn at the mill. Do you say one is lumber and the other not lumber or do you say they are both lumber?

A. Well, if the tariff designates things——

Q. I am not asking you about the tariff, I am asking you about the term lumber.

A. I should not consider either lumber; I would say they are both posts.

Q. That is a specific term; post is a specific term?

A. Yes.

Q. Would not classify it in the general term lumber?

A. I would not.

Q. That is specified?

A. We have a specific rate on posts.

Q. You just stated there was no substantial difference in posts and ties?

A. That is true.

Q. Then, what would you classify under that general term?

A. As posts.

Q. What general classification would this special timbers belong—here is material out of timber—it is special material or posts 4 x 6 for wire fence——

The COURT: That is the same question.

Mr. CLARK: I know, but he has not answered it.

The COURT: It is hard for him to answer when you are both talking at the same time.

111 Mr. CLARK: If he will answer.

The COURT: He has answered that question.

The WITNESS: I said I would not classify or consider that lumber.

The COURT: He has testified he would not classify it as lumber; now put your next question. You wanted him to answer that he would and he declined to do it.

Mr. CLARK: But at the same time he testified——

The COURT: Then, you have it; now go forward.

Mr. CLARK: Your Honor was mistaken, he testified——

The COURT: He just testified in answer to your question that he would not classify it as lumber, and then you repeat the identical question.

Mr. CLARK: Your Honor didn't understand my question; I want to know if he makes any difference——

The COURT: I don't know that this is a question between the Court and counsel. Put your next question.

Mr. CLARK: In classifying material or timber, do you make any distinction whether it is sawed in the mill or hewn by hand?

The WITNESS: Lumber, according to the accepted term——

Q. Never mind that.

The COURT: Answer that question, do you make a distinction?

112 A. Yes.

Q. You make a distinction?

A. Yes.

Mr. RODGERS: I want to introduce in evidence some decisions by the Interstate Commerce Commission.

Mr. GLASS: We object to their being introduced in evidence.

The COURT: The offering of the Interstate Commerce Commission's ruling is a novel qestion to the Court. I am not prepared to rule on it at this time, I will ask authority.

Mr. RODGERS: I believe from recent cases I have read, I have come to the conclusion that it is proper for me to introduce them, From reading recent cases of the Supreme Court of the United States, three of them I have here——

The COURT: I invite authority on that proposition. Everything is along new lines. The Court is not advised and I am not satisfied at this time; you gentlemen can go forward with your offering until I look into it. I will take it up later.

Plaintiff rests.

113 J. W. GRIFFITH, a witness for the defendant, testified by deposition as follows:

Q. What is your name?
A. J. W. Griffith.
Q. What business are you engaged in?
A. I am purchasing agent for the Union Pacific Railroad Company.
Q. Did you, as purchasing agent of the Union Pacific Railroad Company, make a contract with the American Tie and Timber Company, Limited, about July 23, 1907, for certain railroad crossties?
A. I did.
Q. Was the contract in writing?
A. It was in writing.
Q. Did the Union Pacific Railroad Company receive any crossties under that contract?
A. It did.
Q. Will you please give the number of ties received under the said contract, the dates of the shipments and the amount of each shipment?
A. We received ties as follows, the dates being those given in shipper's bills:
In October, 1907, 4150, first-class; 300, second-class.
In December, 1907, 6840, first-class; 1803, second class.
In January, 1908, 700, first class. Total, 11,690, first-class; 2,103, second-class.
Q. Please give the dates and amounts of the shipments made during December, 1907?
A. The shipments in December, 1907, the dates being the dates of the shipper's invoices, were:

December 6, five cars	1,725 ties.
December 11, six cars	1,755 ties.
December 13, six cars	2,220 ties.
December 14, one car	364 ties.
December 16, three cars	904 ties.
December 17, one car	350 ties.
December 21, four cars	1,325 ties.
Total	8,643 ties.

114 Q. Did the Union Pacific Railroad Company receive any ties on the contract above referred to during the month of November, 1907?
A. Our records show that no invoices dated in November were received for ties.
Q. Did you receive a letter from the American Tie and Timber Company, Limited, dated December 7, 1907, in regard to the contract above referred to and the shipment of ties?
A. I did.
Q. Will you please produce and hand to the reporter to be identi-

fied as "Exhibit A" and attached to your deposition, a copy of said letter, and state whether or not the same is a true copy of the original letter?

A. I herewith offer a copy of the letter referred to which is a true copy of the original with the exception of the printed letter-head.

"Ex. A.

"SHREVEPORT, LA., *Dec. 7th*, 1907.

Mr. J. W. Griffith,
Purchasing Agent, Union Pacific R. R. Co.,
Omaha, Neb.

DEAR SIR: Referring to the contract for 150,000 white oak crossties that we made with you: We have about gotten the rate and car question settled with the lines on which we are getting the ties and now have something over 75,000 ready for shipment, but we find that the ordinary tie man makes, at least, 15% No. 2 ties, and we are almost forced to take them as all the other tie contractors do.

In your contract you limit us to 5% No. 2, and if it is not asking much, would you not accept a larger percentage of No. 2 ties or allow us to ship them to you at the same price independent of the contract?

Yours truly,
AMERICAN TIE & TIMBER CO., LIMITED,
By J. J. MARSHALL, *Manager*.

Q. Did you reply to that letter?
A. Yes, sir.
Q. On what date?
A. On December 11, 1907.
Q. Will you please produce and hand to the reporter, to be identified as "Exhibit B" and attached to your deposition, a copy of said letter and state whether or not that is a true copy of the original letter referred to?

115 A. I hereby present a copy of the letter referred to, of date December 11, which is a true copy of the letter sent to the American Tie and Timber Company, Limited.

"Ex. B."

"Subject: Acceptance of No. 2 Ties.

DEC. 11, 1907.

American Tie & Timber Co., Ltd., Mr. J. J. Marshall, Manager, Shreveport, La.

DEAR SIR: "Answering your letter of the 7th inst., beg to advise that I would not be willing to accept more than 5% #2 ties. We do not want any, and the 5% which we agreed to accept must be the limit.

Yours truly,
J. W. GRIFFITH,
Purchasing Agent."

Q. Did you or not on or about December 17th, 1907, write and send to the plaintiff in this case another letter.

A. I did.

Q. Will you please produce and hand to the reporter to be identified as "Exhibit C" and attached to your deposition, a copy of said letter and state whether or not that is a true copy of the original letter referred to?

A. I hereby present a copy of the letter of December 17, 1907, to the American Tie and Timber Company which is a true copy of the original letter sent them:

"Ex. C."

"Subject: Cancellation of Tie Contract.

DEC. 17, 1907.

American Tie & Timber Co., Mr. J. J. Marshall, Manager, Shreveport, La.

DEAR SIR: Referring to contract with your company, dated July 23, 1907, for 150,000 white oak crossties "delivery to commence on or before October 1, 1907, and continue at the rate of
116 15,000 ties per month until deliveries are completed," according to my records you have shipped to date, including bills received yesterday, 7,336 ties, which as you know, is not a specific fulfillment of the contract, and the contract is void on that account.

Since that contract was made we have received hundreds of thousands of crossties on other contracts, and now have on hand our entire requirements of crossties for the year 1908. This letter is to notify you that we do not require the ties remaining due on your contract, that we are unable to accept same and you are requested to discontinue shipments.

Yours truly,

J. W. GRIFFITH,
Purchasing Agent.

C. C. to J. H. S.
E. C. C.

Q. How were the letters of December 11 and 17 transmitted?

A. They were transmitted by United States mail.

Q. Were you or were you not acting for the Union Pacific Railroad Company in writing the above mentioned letters?

A. I was.

Q. Please state whether or not the Union Pacific Railroad Company needed and desired to obtain the crossties mentioned in the contract hereinbefore referred to at the time the said contract was made?

Mr. RODGERS: We object.

The COURT: It is immaterial.

The defendant excepts.

Q. How was it on December 17, 1907; that is, did or did not the Union Pacific Railroad Company need or want the ties mentioned in the contract referred to?

Mr. RODGERS: We object.
The COURT: I sustain the objection; it is immaterial.
To which ruling of the Court the defendant excepted.

117 Q. Please state whether or not your letter of December 17, above referred to gives the reason for cancelling the contract.
A. The letter referred to does give the reason for cancelling the contract.
Q. Did you have any conversation with a representative or representatives of the plaintiff in this case concerning the cancellation of the contract, and if so, with whom, and state as near as you can the substance of the conversation?
A. From a letter written on December 17, to the American Tie & Timber Company, I note that Mr. J. J. Marshall, representing that company had called on me and interviewed me on that date, but I am unable to state the substance of that interview.
Q. Did he make any objection or protest against the cancellation of the contract above referred to?

Mr. RODGERS: We object; we were not required to make protest. Here is a letter that says the contract is cancelled and gives the reason.
The COURT: I permitted the manager of the plaintiff company to testify that he tried or made efforts to prevent the cancellation. I will permit the question.
To which ruling of the Court the plaintiff excepted.

A. He made no protest against our legal right to cancel the contract. I cannot exactly recall the substance of our conversation, but he evidently acquiesced in the cancellation of the contract, requesting only that we take about twenty cars of ties which he claimed to have under load at that time, and which I agreed to take.
Q. Please state what steps or action the Union Pacific Railroad Company was taking on or about December 17, with reference to receiving further shipments of crossties, and which such steps or actions were being taken?

Mr. RODGERS: We object.
The COURT: I sustain the objection.
To which ruling of the Court the defendant excepted.

118 Q. Is it or is it not a fact that you cancelled the contract above referred to, because of the failure of the plaintiff in this case to ship 15,000 ties per month, as called for by the contract.
A. Yes, sir; it is a fact.

J. W. GRIFFITH.

R. C. ANDREWS, a witness for the defendant, being duly sworn, testified as follows:

By Mr. MCCORMICK:

Q. Mr. Andrews, are you the Mr. Andrews who was superintendent of the Texas & Pacific—assistant superintendent at Marshall?
A. Yes, sir.

Q. What are your initials?
A. R. C.
Q. Did you hear the correspondence read, purporting to be from you to the American Tie and Timber Company, Limited, regarding shipments of ties?
A. Yes, sir.
Q. At the time you received—did you receive that letter from the American Tie and Timber Company?
A. Yes, sir.
Q. And you wrote the reply that was introduced in evidence?
A. Yes, sir; I wrote it.
Q. What department of the Texas & Pacific Railroad is under your charge?
A. The transportation.
Q. What do you mean by that?
A. The furnishing of cars and moving freight.
Q. What department of the Texas & Pacific Railroad, especially, handles the question of rates?
A. The traffic department.
Q. Are you at all times advised as to the rates on the T. & P.?
A. No, sir.
Q. Does it ever occur that mistakes are made as to rates by the operating department?
A. I think so.
Q. What was your experience in this instance about the tie question? You got a request to furnish cars for ties?
A. Yes, sir.
Q. Did you examine to see whether the rate was in on ties or not?
119 A. I did not.
Q. Did you learn whether there was or not?
A. Yes; I was advised shortly afterwards that no rates were in effect by which these ties could be moved.
Q. Upon receipt of this information, what did you do?
A. We instructed the agents along the line to not accept for shipment oak ties billed to interstate points, for the reason that there were no rates in effect by which they could be moved at that time.
Q. If a person requested cars from you for any commodity that you did not know whether there was any rate on it, what would—would you furnish the cars?
A. Yes; I presume that there was a rate in effect by which the commodity could be moved.
Q. If you found out later that there was not, what action would you take?
A. I would instruct the agents not to accept the shipment.
Q. The same action you took in this instance?
A. Yes; the same action.
Q. In regard to the transportation of oak ties—of railroad ties and of lumber, is there any difference in the way of transporting the same?
A. I am not sure that I understand the meaning of the question.

Q. Ordinary lumber and oak ties; is there any difference in the manner—physical manner in which they are transported over the railroad?

A. No; I think not in the way of transporting.

Q. Is there any difference on the wear and tear of the rolling stock?

A. I would consider that there would be more wear and tear in the shipment of crossties than on lumber.

Q. What would be your reason for that?

A. Lumber is usually made with a smooth surface, while ties are irregular.

Mr. RODGERS: We object, because it is immaterial.

Mr. CLARK: I think it is immaterial.

Mr. MCCORMICK: We withdraw the question.

120 The COURT: The question here, is: are crossties lumber?

Cross-examination.

By Mr. RODGERS:

Q. Are you the assistant superintendent at Marshall?

A. Yes, sir.

Q. These letters that were read—these requests were made in due form by the American Tie and Timber Company for cars to be placed along stations on your road, were they not?

A. The letter I heard read was; yes.

Q. These requests were properly made on you for cars for shipment of this commodity, it is proper for people to make requests on you for cars?

A. Yes; it is proper.

Q. You gave instructions to place them—where to be placed?

A. Yes, sir.

Q. Did you move any ties from that division—what divisic' are you on, Marshall to where?

A. Marshall to Boyce.

Q. Marshall, Texas, to Boyce, Louisiana?

Q. [A.] Yes, sir.

Q. What distance is that?

A. The territory embraces about two hundred and fifty miles.

Q. Did you ever move any oak ties before?

A. I did not know at that time; I have learned since, three cars were moved.

Q. These are the only ones that you have moved?

A. These were the only oak ties moved to interstate points on the Louisiana end.

Q. Were there others moved?

A. One from Chopin and two from Cypress.

Q. Where were the others moved—the one you say—the only ones moved from the interstate points—where were the others moved?

A. I don't recollect.

Q. Which way would they move from that country?

A. I do not know.

Q. You could not reach any other road without making it an interstate shipment from that territory with ties?

A. Yes; we have junction points with lines in Louisiana?

Q. Don't you know that ties moved out of that territory move completely out of the State of Louisiana?

121 A. No, sir; I do not.

Q. You don't know anything about the rate?

A. No, sir.

Q. You presume they had a rate in effect under which they could be moved?

A. Yes, sir.

Adjournment at 5 o'clock, until 10 o'clock to-morrow morning.

SATURDAY MORNING, 10 A. M.

H. S. HINTON, a witness for the defendant, being duly sworn, testified as follows:

By Mr. MCCORMICK:

Q. Please state your name to the jury.

A. H. S. Hinton.

Q. Mr. Hinton, are you the T. & P. Commercial Agent at Shreveport?

A. Yes, sir.

Q. Did you, in the fall some time of 1907, have occasion to communicate with Mr. Marshall of the American Tie & Timber Company, about rates applicable on ties?

A. Yes, sir; I did.

Q. Whether there was a rate on ties?

A. Yes; I received a letter from Mr. Sargent, requesting me to call on them.

Q. Do you remember what date that was?

A. Well, I believe I called on them—I think it was September 28th, 1907.

Q. I didn't catch the date?

A. September 28th, is my recollection—1907.

Q. What message or information did you deliver to Mr. Marshall?

A. Well, I told him that I was requested to call on him by Mr. Sargent in answer to his letter and to say to him that we had no published commodity rate on oak ties from Sodus, Marthaville, etc., to Linwood and Junction, Kansas, and some other point.

Q. The points he had inquired about in his letter?

A. Yes, sir; he inquired about it in his letter to Mr. Sargent.

Q. What did you tell him about whether or not you had any rate?

122 A. How is that?

Q. What did you tell him about the rate?

A. I told him we had no published commodity rate on oak crossties.

Q. Between the points he inquired about?

A. Yes, sir.

Q. Well, what did Mr. Marshall say to you about it?

A. Well, he—well, I told him in connection with that, certain figures Mr. Sargent would undertake to have published, provided they were satisfactory to him, and gave him a reasonable time to get them—comply with the Interstate Commerce Commission.

Q. Certain figures Mr. Sargeant will publish—what was the idea in publishing?

A. Well, I had no published—I gave him no published figures, because we didn't have any.

Q. You mean by that you gave him certain figures of a rate you would put in, provided it was acceptable to him and he would use it?

A. Yes; that is the idea.

Q. What rate did you express to him—propose to him to put in?

A. The rate was fifty cents to Linwood and Grand Junction.

Q. What did he say about that?

A. Mr. Marshall asked me to give him a written statement of those quotations and I told him I didn't care to do it.

Q. I cannot hear you.

A. Mr. Marshall asked me to give him a written statement or give him these quotations in writing that I had named, of fifty and seventy-five cents, and I told him I didn't care to—I didn't feel that I cared to do that without first taking it up with Mr. Sargent, and I asked why a verbal answer was not sufficient, and then he said he wanted this information for the Union Pacific or Tie Representative, as I remember, on the Union Pacific; that under this contract with that company, the Union Pacific, it was—his company, the American Tie & Timber Company were not interested in the freight rate.

Q. Did he say who was interested in the freight rate?

A. Huh!

Q. Did he say who was interested in the rate?

A. He said that—well, yes; he said the Union Pacific took care of that feature.

Q. He was getting the information for them?

123 A. Yes; that is what I understood.

Q. Did Mr. Marshall or anybody connected with the American Tie & Timber Company ask you for any tariff sheet?

A. I think I received a letter from the American Tie & Timber Company asking for a certain lumber tariff.

Q. What did you do in response to that?

A. I wrote to Mr. Sargent for the issue—secured two of them as I recollect.

Q. Did you ever deliver any lumber tariff as requested?

A. I expect I did; I got them for that purpose, and I expect I delivered them to them; I would not be positive.

Q. Did he ever ask you for any tariff sheet on ties?

A. Not that I can recall.

Cross-examination.

By Mr. RODGERS:

Q. When you went to see Mr. Marshall, he showed you the contract between the American Tie and Timber Company and the Union Pacific Railroad Company, did he not?

A. No, sir; he did not.

Q. Did he tell you he had a contract?

A. He told me he did have a contract, and I think he referred to it at the time, but I did not peruse it, nor he did not read it to me. That is, I don't recollect that he read it. I think he said he had a contract, and I am pretty sure he referred to the contract during the conversation.

Q. You mean he took the contract out and read it over?

A. I don't think he read it over, but he looked at his contract and said in that contract they take care of the freight rate.

Q. Now, don't you know, as a matter of fact, that he pulled out the contract and showed it to you and told you that if he could not get this twenty-four cent rate, that contract could be canceled?

A. No, sir; he most emphatically did not. He never did at any time tell me that.

Q. Did he read you that clause?

A. If he did I don't recollect it.

Q. You would say—you would not say he did not?

A. I won't say, positively; I don't think he did.

Q. You offered to put in a rate of fifty cents, you say, to Linwood, Kansas, and Grand Junction?

A. That is the rate Mr. Sargent was willing to make.

Q. Fifty cents per hundred weight?

124 A. Per one hundred pounds.

Q. Where was the seventy-five cent rate you offered?

A. Marshalltown, Iowa; Minneapolis, Minnesota; Chicago, I believe that was practically all of them.

Q. He told you he would like to have you put your proposition in writing to send to the Union Pacific?

A. Yes, sir.

Q. You refused to do it?

A. I said—well, I didn't decline absolutely; I stated I would leave the matter to my general freight agent.

Q. I thought you testified on direct examination that you said you didn't care to do it?

A. I said I didn't car- to do it without consulting my superior.

Q. You are still in the employ of the Texas & Pacific Railroad?

A. Yes, sir.

Q. As commercial agent at Shreveport?

A. Yes, sir.

Q. The tariff you delivered to Mr. Marshall for the American Tie & Timber Company was joint through tariff, eighty-five hundred-H.

A. My recollection is, that is the tariff.

Q. That is the only joint through lumber tariff you had in effect at that time?

A. No; we have a number of tariffs; we had a number of tariffs.
Q. Reaching what stations?
A. As I recall—I think that is the only tariff reaching these points in question.
Q. You called on him at Mr. Sargent's request?
A. Yes, sir.
Q. To inform him that there were no rates—that oak cross ties were not mentioned as a commodity and had no——
A. We had no commodity rate in that tariff—was not published in that tariff.
Q. Was not published in that tariff?
A. Had no published through rate on oak railroad cross ties.
Q. Didn't you testify on direct examination that you notified him you had no rate—commodity rate on oak ties?
A. Well, I probably stated that; yes.

125 E. L. SARGENT, a witness for the defendant, being duly sworn, testified as follows:

By Mr. MCCORMICK:

Q. Please state your name to the jury.
A. E. L. Sargent.
Q. Mr. Sargent, you are general freight agent of the Texas & Pacific Railway Company?
A. Yes, sir.
Q. How long have you been engaged in that work—in that position?
A. Since September, 1892.
Q. What is the first thing you had to do with the offer of the American Tie & Timber Company to ship some ties from Louisiana to Linwood, Kansas—what is the first information you had about that.
A. A letter from the commercial agent is my recollection. After we had sent them a tariff on lumber they wanted a rate on cross ties.
Q. The first you heard from them was a request for a lumber tariff?
A. Yes, sir.
Q. Was that furnished?
A. It was furnished through our commercial agent.
Q. What is the first communication you had from him, relative to ties?
A. I would have to look at my memorandum; I don't recollect. (Refers to memorandum). September 24th; however, I think the documents are all on file.

(Witness is shown a letter).

Q. Is that the letter?
A. That is a part of it.
Q. Copy of the letter you received from the American Tie & Timber Company?
A. Yes, sir.

Q. That has already been introduced in evidence.

Mr. McCORMICK:

We offer in evidence letter from the American Tie & Timber Company to Mr. E. L. Sargent, General Freight Agent of the Texas & Pacific Railway of Dallas, as follows:

126 SEPTEMBER 24, 1907.

Mr. E. L. Sargent, General Freight Agent, Texas & Pacific Railway Co., Dallas, Texas.

DEAR SIR: Please advise us your rate on oak railway cross ties from Marthaville, La.; Powhattan, La.; Sodus, La., and Derry, La., to El Paso, Texas; Abilene, Texas; Marshalltown, Ia.; Minneapolis, Minn.; Waterloo, Ia.; Linwood, Kansas; Chicago, Ill.; Kansas City, Mo.; Colorado Springs, Colo., and Junction City, Kan.

A prompt reply will be greatly appreciated.

Yours very truly,

AMERICAN TIE & TIMBER CO., LIMITED,

By —— ——, *Manager.*

Q. What did you do in response to that letter?

A. On September 25th, we replied to them through Mr. Hinton, that there were no rates of freight, but offered to put in a fifty-cent rate if we were assured it would be used.

Q. When did you next hear from them about that?

A. Mr. Hinton advised us they wanted the quotation that they were not interested in the rate, but were making inquiry for the Union Pacific Railway.

Mr. RODGERS: We object.

The COURT: I sustain the objection.

The COURT: Gentlemen of the jury, you need not consider the answer of the witness.

Mr. McCORMICK: What was the next you heard from them about it or heard about it?

A. We had a letter from Mr. Hinton under date of October 4th, confirming the conversation.

Q. And what did you next hear from them?

Mr. RODGERS: We object to the conversation.

The COURT: You will not consider anything about the conversation.

127 Mr. McCORMICK: What was the next you heard directly from the American Tie & Timber Company or from the Interstate Commerce Commission?

A. We had a letter under date of November 7th, 1907, from the Interstate Commerce Commission, enclosing the copy of a let-er of complaint from the American Tie & Timber Company of date September 30th—a letter from the Interstate Commerce Commission to E. L. Sargent, dated November 7th. I think you introduced it yesterday.

(Witness is shown letter of date October 7th, 1907, addressed to E. L. Sargent.)

Q. Is that the letter you received, Mr. Sargent?
A. Yes, sir.
Q. Did you receive that letter from Mr. Cockrell?
A. Yes, sir.

Mr. McCORMICK: We offer in evidence, letter dated October 7th, 1907, from F. M. Cockrell, Commissioner of the Interstate Commerce Commission to E. L. Sargent, General Freight Agent of the Texas & Pacific Railway at Dallas, as follows:

Martin A. Knapp, Chairman. A. V. S.
Judson C. Clements.
Charles A. Prouty.
Francis M. Cockrell.
Franklin M. Lane.
Edgar E. Clark.
James S. Harlan.
Edw. A. Moseley, Secretary.

Interstate Commerce Commission.
Washington, D. C.

In Reply, Address Interstate Commerce Commission.

OCTOBER 7, 1907.

Mr. E. L. Sargent, General Freight Agent, Texas & Pacific Ry. Co., Dallas, Texas.

DEAR SIR: Herein I send you copy of a letter received
128 from the American Tie & Timber Company, Limited, of Shreveport, La., dated September 30, 1907, complaining of discrimination and of refusal to transport products.

Please look into this matter and advise the commission what your road can do or will do in the premises, and oblige,

Yours truly,

F. M. COCKRELL,
Commissioner.

Enc.

Q. This is the copy of the letter attached to that letter?
A. Yes, sir.

Mr. McCORMICK: We offer in evidence letter dated Shreveport, La., September 30, 1907, from J. J. Marshall, Manager of the American Tie & Timber Company to the Interstate Commerce Commission at Washington, as follows:

American Tie and Timber Company, Limited.

J. J. Marshall, Manager.

SHREVEPORT, LA., *Sept.* 30, 1907.

Hon. Secretary, Interstate Commerce Commission, Washington, D. C.

DEAR SIR: We are enclosing you copy of our letter of Sept. 24, 1907, to Mr. E. L. Sargent, General Freight Agent, of the Texas & Pacific Ry. Co., at Dallas, Texas, in which we request him to quote us rates on oak railway cross ties to interstate points: Mr. Sargent has not answered this letter, but the Commercial Agent of the Texas & Pacific Ry. Co., Mr. H. S. Hinton, who is located in Shreveport, told our Manager that he had received a letter from Mr. Sargent, instructing him to notify us that the Texas & Pacific Ry. Co. did not have any published rate on oak cross ties between the points mentioned in our letter, but, that if we would give notice in time to allow them to publish a rate that they may make one of 50c per cwt. from the points mentioned in Louisiana and Abilene, Texas, El Paso, Texas, Kansas City, Mo., and Junction City, Kansas, and a rate of 75c per cwt. to the other points named in our letter. We now have on file in our office a tariff published by the Texas & Pacific Ry. Co. which reads as follows: "Joint Through
129 Lumber Tariff" T. & P. No. 8500-H, applying on lumber, all kinds (except walnut and cherry) lath and shingles and articles taking same rates. Then refers to a list of forest products (2) which covers nearly everything except cross ties.

We take the position that the Texas & Pacific's reply through the medium of their commercial agent in person, who we requested to give us an answer in writing, but up to the present time we have not received, is an unjust discrimination against our product, and one if enforced will deprive us of transportation at a reasonable rate.

We now have on the line of the Texas & Pacific Ry. between 50 and 75 car loads of oak cross ties, which we desire to ship to interstate points, and if we are delayed in moving them it will cause us a severe loss. We request your ruling at the earliest convenient date.

Yours very truly,

AMERICAN TIE & TIMBER CO.,
LIMITED,
By J. J. MARSHALL, *Manager.*

Q. Did you receive that letter, Mr. Sargent?
A. I did; yes, sir.
Q. Is that a copy of your reply? (Hands witness letter.)
A. Yes; this is a copy.

Mr. MCCORMICK: We introduce in evidence, letter of E. L. Sargent, dated October 11, 1907, addressed to the Honorable Interstate Commerce Commission, signed by E. L. Sargent, which reads as follows:

130 The Texas & Pacific Railway Company. Freight Traffic Department.

NOTICE.—All rates quoted by this company are for immediate use and are subject to change without notice, except the printing of Tariffs and posting of same as provided for by law.

E. L. Sargent, General Freight Agent.
H. L. Redfield, Ass't General Freight Agent.

DALLAS, TEXAS, *Oct.* 11, 1907.

File 2-B.

Authority No. 105491.

To the Honorable the Interstate Commerce Commission, Washington, D. C.

GENTLEMEN: This will serve to acknowledge receipt of Commissioner Cockrell's letter of October 7th, enclosing copy of communication from Manager Marshall of the American Tie & Timber Company, Limited, dated Shreveport, La., September 30th, in which informal complaint is made of the rates we have quoted on oak cross ties from certain points on our line in Louisiana to Kansas City and several other points mentioned in their letter.

The situation, from our point of view, has been explained to the Commission on a previous occasion, and we attach for convenient reference, copy of our letter of August 19th, addressed to Secretary Moseley, setting forth certain facts, which in our opinion, has a material bearing on the situation. In reply to our letter, Mr. Moseley wrote us under date of August 26th, suggesting that we add gum, cottonwood and willow ties to our lumber Tariff No. 8500-H. This has been done in Supplement No. 170 to that issue (Supplement No. 168 to I. C. C. No. 792, copy herewith enclosed for ready reference) and we are in hopes that this addition will result in relieving the situation, in so far as points named in that tariff are concerned.

In so far as Mr. Marshall's complaint is concerned, will state that we have a further letter from our Commercial Agent at Shreveport, dated October 4th, stating that Mr. Marshall has again ad-
131 vised him that his Company is not interested in through rate, as under his contract with the Union Pacific Railroad Company, to which company he has sold the ties, the Union Pacific pays the freight. We, therefore, assume, that in complaining of the present adjustment, Mr. Marshall is acting for others and not his own company.

Under existing conditions, as explained in our letter of August 19th, we hope that the Commission will decide that no further change should be made in the tariff.

Yours truly,

____ ____,

General Freight Agent.

Q. When did you hear from them again, Mr. Sargent?
A. We had a letter dated November 14th.
Q. Is that the letter you received? (Hands witness letter.)
A. That is the letter in reply to ours of the 11th.

Mr. McCORMICK: We introduce in evidence letter, to E. L. Sargent, from the Interstate Commerce Commission, of date November 14th, 1907, which reads as follows:

Interstate Commerce Commission.

Washington.

NOVEMBER 14, 1907.

Mr. E. L. Sargent, General Freight Agent, Texas & Pacific Railway Company, Dallas, Texas.

DEAR SIR: Your favor of October 11, File 2-B, Authority No. 105,491, addressed to this Commission, in reply to my letter of October 7, enclosing a communication from Manager Marshall of the American Tie & Timber Company, complaining of rate on oak cross ties from points on your line in Louisiana to Kansas City, and several other points, was duly received and a copy was sent to the American Tie & Timber Company on October 28.

The Commission has received the reply of this complaining Company, dated the 6th, instant, in which they refer to your letter and say:

132 The substance of his appeal is to deny our company just and reasonable rates on a commodity, the price of which, he, in the interest of his road, seeks to drive down and keep down by legally eliminating competition."

They further say that your explanation as to why the rate on oak and cypress ties should not be the same as lumber, is inconsistent and they furnish a long list of articles that have the same rate as lumber including staves, heads and hoops.

They also say:

"The very best cypress and oak tie timber is used in making these articles, and if it were not for the discrimination in favor of the stave men, a great deal of this timber would be made into cross ties and as fully 50% of the staves are shipped to Europe, and are manufactured by foreign labor, to use the timber for cross ties would keep the timber at home where it is needed and keep our trunk lines of railroad in repair."

They say it is not fair for the Texas & Pacific Railway Company to employ the methods you indicate. They further state:

"The facts are that for a long time they have purchased their ties in this section from one contractor, and by their excessive rates have made it impossible for any other person to handle any oak or cypress ties, and any one owning oak or cypress ties or timber, have been forced to sell to their contractor or not at all, which practically gave him a monopoly of the tie business of this class on the Texas & Pacific Railway, and they are still discriminating in favor if this contractor, for in the past few weeks he has shipped off the line of

the Texas & Pacific Railway, which shows that he is doing other business besides what he is doing for the Texas & Pacific Railway, and he travels in Louisiana over their road on a pass."

They further say: "He advises you in his letter of Oct. 11th, that he has a letter from their Commercial Agent at Shreveport, under date of Oct. 4th, stating that Mr. Marshall has again advised them that this company is not interested in the through rate, as under his contract with the Union Pacific Company to which Company he has sold ties, the Union Pacific pays the freight.

If their Commercial Agent wrote them this, he is mistaken as to his understanding of his conversation with Mr. Marshall, as it was not his intention to leave any such impression, as it would be false, for the fact is that the ties are sold at a delivered price, and we are very much interested in the through rate, and are not working in the interest of any one except ourselves.

133 Please advise the Commission fully in the premises and as to what course you propose to pursue in this case, and whether you can afford any relief.

Yours truly,

F. M. COCKRELL,
Commissioner.

Q. That was dated November 14. Mr. Sargent, did you reply to that letter?

A. November 18th.

Mr. McCORMICK: We introduce in evidence copy of letter from E. L. Sargent, General Freight Agent of the Texas & Pacific Railway Company, to F. M. Cockrell, Commissioner, of date November 18, 1907, which reads as follows:

The Texas & Pacific Railway Company.

Freight Traffic Dep't.

NOTICE.—All rates quoted by this Company are for immediate use and are subject to change and correction to conform to the legal tariffs of this Company, published, filed and posted as required by law.

File 1-A.

E. L. Sargent, General Freight Agent.
H. L. Redfield, Ass't General Freight Agent.

DALLAS, TEXAS, *November* 18, 1907.

To the Honorable the Interstate Commerce Commission, Washington, D. C.

DEAR SIR: This company is in receipt of a communication signed by the Honorable F. M. Cockrell, Commissioner, in reference to a communication received by the Commission from Manager Marshall of the American Tie & Timber Company, complaining of rates on oak ties from points on our line to Kansas City and other points.

We have treated the subject very exhaustively on a number of previous occasions, and we thought we had outlined our position so that it would be considered a very reasonable one, all the circumstances being taken into consideration.

134 In regard to the labor in preparing cross ties as against staves and headings, it is my belief that there is at least three times the amount of labor expended in the manufacture of staves and heading as there is on cross ties, which I believe would be proven if investigated by experts of the government.

As far as the purchase of ties from one contractor is concerned, if an investigation was set on foot, it could be conclusively shown that the price of ties made to this company by Mr. Signor, who is undoubtedly the alleged favored contractor referred to, are so much more reasonable than the prices of any other concern that have ever offered us any ties of a similar description, that any further argument on the subject would fall to the ground. We think it is no discrimination for any company to buy in the cheapest market.

The only oak ties that have been shipped off of the Texas & Pacific Railway by this contractor that we have been able to learn anything about, went to the Missouri Pacific Railway at Alexandria and one of the members of this system. Inasmuch as the freight rate assessed on these ties, for points averaging less than one hundred miles, was thirty cents per hundred pounds, it would appear to us that the rate quoted Mr. Marshall for the movement of his ties, distance being considered, was very reasonable.

I do not think that the Texas & Pacific Railway can be criticised in its efforts to obtain its absolute needs at the lowest possible figure. Am satisfied that if any competitive concern had been prepared to offer cypress or oak ties at anywhere near the figure at which we are buying from the present contractor, their offers would have been promptly accepted.

I trust that when Mr. Cockrell has an opportunity of reviewing the entire correspondence he will decide that our position in the matter is not unreasonable and allow us to continue our present policy.

Yours truly,

General Freight Agent.

Q. Is that a reply to the letter just read?

A. Yes, sir.

Mr. McCormick: We offer in evidence letter dated November 22, from the Interstate Commerce Commission to Mr. E. L. Sargent, General Freight Agent of the Texas & Pacific Railway Company at Dallas, as follows:

135 Interstate Commerce Commission,
Washington, *November* 22, 1907.

Mr. E. L. Sargent, G. F. A., The Texas & Pacific Railway Company, Dallas, Texas.

Dear Sir: Your favor of the 18th, instant, File 1-A, has been duly received, and a copy has been transmitted to Mr. Marshall,

Marshall, Manager of the American Tie & Timber Co., for we have been acting as a friendly intermediary between the shipper and the carrier. As no satisfactory conclusion has been reached, the Commission wrote Mr. Marshall as per the attached letter.

What course Mr. Marshall will pursue, is, of course, a matter this Commission does not know and cannot control.

Yours truly,

F. M. COCKRELL,
Commissioner.

Encl.

Mr. McCORMICK (Witness is shown letter): Is that a copy of your reply to the letter I have just read, of the 22nd of November?

A. This is a copy of the letter to the Commissioner—to Commissioner Cockrell, after receipt of his letter you have just read.

Mr. McCORMICK: We introduce in evidence letter of Mr. Sargent's to the Interstate Commerce Commission, dated November 25th, 1907, which reads as follows:

136 The Texas & Pacific Railway Company. Freight Traffic Department.

Notice.

All rates quoted by this Company are for immediate use and are subject to change and correction to conform to the legal tariffs of this Company, published, filed and posted as required by law.

E. L. SARGENT,
General Freight Agent.
H. L. REDFIELD,
Ass't General Freight Agent.

File 1-A.

DALLAS, TEXAS, *Nov. 25th*, 1907.

To the Honorable the Interstate Commerce Commission, Washington, D. C.

GENTLEMEN: This company begs to acknowledge receipt of your favor of the 22nd, inst., signed by Commissioner Cockrell, enclosing copy of letter which has been transmitted to Mr. Marshall, Manager of the American Tie & Timber Co., at Shreveport, relative to rates on oak ties.

We beg to advise that this is the first expression that we have received from the Commission or any of its members, relative to their views on the subject of rates on ties or other material entering so largely into the uses of railroad companies.

This Company has no desire to have or put into effect, rates on any class of material which the Commission view with unfriendly feelings or believe are discriminatory or unjust to patrons of this company. In confirmation of this statement, we beg to advise that instructions have this day been given to apply on legal notice, the

lumber rates of the classes to which they belong on ties of every description. Trusting that this will close the correspondence which undoubtedly has been annoying to your Honorable body, in a satisfactory manner, I beg to remain,

Yours truly,

____ ____,

General Freight Agent.

Q. I have here a letter dated November 25th, signed by the general freight agent, sent to the Commission.

A. That is the copy of an original letter that was sent there.

137 Mr. McCORMICK: We offer in evidence letter dated November 25, 1907, from Mr. E. L. Sargent to the Interstate Commerce Commission which reads as follows:

The Texas & Pacific Railway Company, Freight Traffic Department.

Notice.

All rates quoted by this Company are for immediate use and are subject to change and correction to conform to the legal tariffs of this Company, published, filed and posted as required by law.

E. L. SARGENT,
General Freight Agent.
H. L. REDFIELD,
Ass't General Freight Agent.

File 1-A.

DALLAS, TEXAS, *Nov. 25th*, '07.

To the Honorable the Interstate Commerce Commission, Washington, D. C.

GENTLEMEN: Referring to our letter of even date in regard to rates on cross ties.

If the Commission deems it advisable, we would be pleased to receive telegraphic authority from them to make our issues establishing these rates, effective on less than statutory notice. In fact, it would materially assist in handling the matter, should the Commission see fit to permit these rates to become effective on five days' notice to the Commission.

Please wire us at our expense on receipt of this letter and oblige.

Yours truly,

____ ____,

General Freight Agent.

Q. Is that a reply to that communication? (Hands witness letter).

A. That is a reply to that communication.

Mr. McCORMICK: We offer in evidence telegram as follows:

138 (On Receiving Blank of Western Union Telegraph Company.)

Received at 1023 a tn rs. 34 Collect lexa—255 P. M.

WASHINGTON, D. C., *Dec.* 2, ——.

E. L. Sargent, Gen'l Frt. Agent, Tex. & Pac. Ry. Co., Dallas, Texas:

Your letter to commission, November twenty-five. If you make application in regular form for permission to establish on less than statutory notice the rates referred to, it will have prompt consideration.

E. A. MOSELEY, *Sec'y.*

Q. I have here a letter under date of December 4th, 1907, to Mr. E. L. Sargent, General Freight Agent of the Texas and Pacific Railway Company at Dallas, Texas. (Witness is shown letter.)

A. That is the next communication which passed on the subject.

Mr. McCORMICK: We offer in evidence letter from the Interstate Commerce Commission to Mr. E. L. Sargent at Dallas, Texas, signed by F. M. Cockrell, Commissioner, which reads as follows:

Martin A. Knapp, Chairman. G. P. B.
Judson C. Clements.
Charles A. Prouty.
Francis M. Cockrell.
Franklin M. Lane.
Edgar E. Clark.
James S. Harlin.
Edw. A. Moseley, Secretary.

In Reply, Address "Interstate Commerce Commission."

INTERSTATE COMMERCE COMMISSION,
WASHINGTON, *December* 4, 1907.

Mr. E. L. Sargent, General Freight Agent, Texas & Pacific Railway Company, Dallas, Texas.

139 DEAR SIR: Please accept my sincere thanks for your favor of the 25th, ultimo, File 1-A; also your favor of the same date asking permission to make your rates on ties effective in five days.

A telegram was sent you on the 2nd instant, stating that if you make application in the regular form, prompt attention will be given it. I hope this will end the many letters we have been receiving in regard to ties.

In acting as a friendly intermediator we have been able to adjust about four-fifths of the complaints that have been received, without the formality of a hearing and trial. So far as I can, I am aiming to adjust all complaints as speedily as possible and as many of them as possible, without a formal hearing and the expenses and annoyance of having shippers and carriers attending our hearings. Where

I feel certain what the law is, I prefer telling the shipper that he has no case, or telling the railroad plainly that the case is against them.

Very truly yours,

F. M. COCKRELL,
Commissioner.

Mr. McCORMICK: There was notice sent up there in the meantime?

A. December 7th follows that.

Q. What is this paper, Mr. Sargent? (Hands witness paper).

A. This is an application to apply lumber rates on ties of the same wood.

Mr. McCORMICK: We offer in evidence, application by the Texas & Pacific Railroad Company to apply rates to become effective five days after the filing thereon with the Interstate Commerce Commission, which reads as follows:

The Texas & Pacific Railway Company.

DALLAS, TEXAS, *December 7th*, 1907.

To the Interstate Commerce Commission, Washington, D. C.:

The Texas & Pacific Railway Company, by E. L. Sargent, its General Freight Agent, does hereby respectfully petition the Interstate Commerce Commission that it be permitted, under Section 6 of the Act to Regulate Commerce, as amended June 29, 1906, to put in force the following rates, to become effective five days after the filing thereon with the Interstate Commerce Commission.

140 Lumber rates of the classes of lumber to which they belong, on wood railroad ties, car loads, from points on the Texas & Pacific Railway, in Louisiana, Arkansas and Texas to interstate points.

Your petitioner further represents that the said rates above mentioned will be published in various Tariffs and Supplements.

And your petitioner further bases such request upon the following facts, which present certain special circumstances and conditions justifying the request herein made:

We desire to establish rates on this business in accordance with the views of Commissioner Cockrell, expressed in his letters of November 22nd and December 4th, 1907, and our application to make the rates effective five days after the filing thereof with the Interstate Commerce Commission is due to the fact that shipments of oak cross ties are offering for interstate points, which cannot now be accepted, as there are no tariffs filed with the Interstate Commerce Commission to cover.

THE TEXAS & PACIFIC RAILWAY COMPANY,

By —— ——,

General Freight Agent.

Subscribed and sworn to before me, this —— day of ——, 1907.

—— ——,
Notary Public.

Q. Is that the application mentioned in that letter?
A. Yes, sir.
Q. The dates were filed in the original communication, were they?
A. Yes, sir.
Q. Did you receive any reply to that? (Hands witness letter).
A. That is a reply to that application.

Mr. McCORMICK: We offer in evidence letter from Mr. Moseley, Secretary of the Interstate Commerce Commission, to Mr. Sargent, under date of December 11, 1907, which reads as follows:

141 Interstate Commerce Commission,

Office of the Secretary.

Edward A. Moseley, Secretary. R. L. C. W. P.

WASHINGTON, *December* 11, 1907.

Mr. E. L. Sargent, General Freight Agent, Texas & Pacific Railway Company, Dallas, Texas.

DEAR SIR: Referring to your application of December 7, 1907, for permission to establish upon less than statutory notice application of lumber rates to wood railroad ties, etc., I beg leave to advise that you should amend the application in question to show the I. C. C. numbers of the schedules in which the desired application will be published.

I note also that your application reads, "Lumber rates of the classes of lumber to which they belong." It is not entirely clear just what is intended by that description, and the Commission will be pleased to have your amendment of the application in addition to showing the I. C. C. numbers as above requested, make the meaning of the clause above quoted specific and definite. Upon receipt of such an amendment prompt action will be taken on your application.

Very respectfully,

E. A MOSELEY, *Secretary.*

Q. Did you make reply to that?
A. On December 18th, 1907. (Witness is shown letter).
Q. Is that the letter?
A. Yes, sir; that is the reply to that letter.

Mr. McCORMICK: We introduce in evidence letter dated December 18th, 1907, addressed to F. M. Cockrell, Commissioner of the Interstate Commerce Commission, written by E. L. Sargent, which reads as follows:

142 File 2353.

DEC. 18TH, 1907.

Hon. F. M. Cockrell, Commissioner, Interstate Commerce Commission, Washington, D. C.

DEAR SIR: Referring to your letter of December 4th, and other correspondence in regard to the question of establishing interstate rates on railroad cross ties.

Herewith, copy of our formal application under date of December 7th, which was made in accordance with suggestion contained in Secretary Moseley's telegram of December 2nd. It now appears from Mr. Moseley's letter of December 11th, it is not considered in proper form.

By referring to the lumber rates of the classes of lumber to which the ties belong, we, of course, mean that oak ties are to take oak lumber rates; pine ties, pine lumber rates; cypress ties, cypress lumber rates, and so on. Pine and cypress ties are now covered as per the above in practically all territory, but it was our idea to have the authority complete so that our publication need not specify the different kinds of cross ties.

In explanation of our general application, will state that our idea was to meet the views of the Interstate Commerce Commission as quickly as possible. It is impracticable for us to specify, at this time, in an application the particular tariffs that would be amended, as some of them would be issued by agents having our power of attorney; in other cases, we would be obliged to secure the concurrence of connecting lines before publishing joint rates, and in the meantime, while waiting for such authorities the original tariffs might be reissued or additional supplements issued; therefore, we wished to obtain the general authority from the Commissioner and then proceed with the publication of Tie rates, making them effective in the individual cases, five days after we file the issues in the office of the Interstate Commerce Commission.

By referring to your file you will see that on November 25th, we indicated our willingness to establish these rates, and perhaps, in view of what has transpired, we would have made better progress by giving statutory notice at the time, instead of attempting to secure authority to establish rates on less than statutory notice, as we do not appear to have progressed very far in our efforts to adjust the matter. First, because we had not filed our application in the usual form
(which we had not considered necessary, owing to the nature
143 of the entire correspondence with you), and now it is stated that our application is not specific enough.

It would, therefore, seem that the matter might run along indefinitely unless you are in position to interpose some assistance in adjusting the matter for us. We are entirely willing and anxious to meet the views of the Commission, and in fact, would like to do so on five days' notice heretofore specified, but if in your opinion the circumstances surrounding the transaction are such as to render it impracticable to issue such special authority, if you will advise to that effect, we will proceed to issue the tariffs as quickly as possible,

effective on the usual statutory notice. We will be under further obligations if you will kindly take the matter in hand and indicate your wishes in the premises, in order that we may proceed as near as we can in accordance therewith.

Yours truly,

____ ____,

General Freight Agent.

Q. When did you get—that was dated December 18th; when did you get a reply to that, Mr. Sargent?

A. This is the reply—January 17th.

Mr. McCORMICK: We introduce in evidence, letter dated January 17th, addressed to Mr. Sargent, by Mr. E. F. Clark, Commissioner, as follows:

144 Martin A. Knapp, Chairman. E. E. C.-J. C. W.
Judson C. Clements.
Charles A. Prouty.
Francis M. Cockrell.
Franklin M. Lane.
Edgar E. Clark.
James S. Harlan.
Edw. A. Moseley, Secretary.

In Reply, Address "Interstate Commerce Commission."

INTERSTATE COMMERCE COMMISSION,
WASHINGTON, *January* 17, 1908.

Mr. E. L. Sargent, G. F. A., Texas & Pacific Ry. Co., Dallas, Texas.

DEAR SIR: Yours of the 18th, ultimo, to Commissioner Cockrell (File 2353) is referred to me for reply.

The very conditions which you cite in support of your desire to have the general far-reaching permission to issue rates on less than statutory notice, as per your request, seem to me to furnish the best argument against the issuance of the permission. To grant it would be to authorize changes in an indefinite number of tariffs published by an unknown number of persons or carriers; and no one can for-see what complications might grow out of the incorporation of changes under that permission entirely foreign to the original intent.

It is apparent that better headway and better results would have been had in this matter if you had proceeded to change the tariffs under statutory notice. We are willing to exercise our authority for changes in rates on less than statutory notice to a reasonable extent and under conditions which we believe were contemplated in the law, but we cannot issue wider or general blanket permissions of this kind. We are willing to grant such permissions in specific instances as you may find it necessary to request in order to make your lumber rates include ties; the idea being to have ties take the same rates as lumber manufactured from the same wood.

Yours truly,

E. E. CLARK,
Commissioner.

Q. After receiving that letter I have just read, Mr. Sargent, what steps were then taken in the matter?

145 A. We proceeded to submit certain tariffs making lumber rates apply on ties. This particular case, the supplement was 172, issued the 13th day of January—made effective February 16th, 1908.

Q. Mr. Sargent, in establishing a joint through rate; that is, over more than one line, what are the steps that are necessary to make in the formation of that tariff?

A. The necessary correspondence with the traffic officials of the lines that form the through line contemplated, get their permission to first establish through rates and afterwards agree on a division of the through rate.

Q. After you have established the amount and division with the different lines interested, you are then in position to——

A. In position to file with the Interstate Commerce Commission.

Q. After the necessary statutory publication. In establishing one line rates over your own line, you can do that immediately?

A. It it is an interstate rate it can be filed with the Commission, but the regular thirty days' notice must be given.

Q. Your portion, you can make at once; as soon as determined to make a rate over your own line, the only thing necessary for you to do is to file immediately with the Interstate Commerce Commission?

A. Yes, sir.

Q. If over a through line you have to have authority from the connecting lines, is that the idea?

A. That is the idea.

Q. Now, in order to meet this situation here; get in a rate on ties, did you have to make the rate over more than one line?

A. We had to take it with the—with our connections—Linwood in this case; we had to take it up with the Missouri Pacific and the Union Pacific officials.

Q. Did you have any way by which you could immediately, and without doing that, file the tariffs?

A. We had no authority; no, sir.

Q. You had no authority over these other roads?

A. No, sir.

Q. You applied to the Commission for authority to put in the rate on five days' notice after the filing of that application?

A. Yes, sir.

Q. Was that your understanding of the ordinary method of putting in the rate on less than statutory notice?

146 Mr. RODGERS: We object; his letter to the Commission shows what he understood.

The COURT: I will permit him to testify whether or not he wrote that letter to meet the requirements as he understood them.

Mr. RODGERS: He has written the letter to that effect to the Commission.

The COURT: I understand the correspondence, which is in evidence, speaks for itself.

Mr. McCORMICK: Was it your understanding that the form of application you made was proper and ordinary manner in which to apply for that kind of emergency rate?

Mr. RODGERS: We object as leading.

The COURT: I will permit the question.

Mr. McCORMICK: I don't catch your answer.

A. Yes, sir.

Q. And this correspondence then ensued between you and the Interstate Commerce Commission, relative to the form of your application?

A. Yes, sir.

Q. Mr. Sargent, when did you determine you were not making progress by that effort and abandoned it?

A. When we received the letter from Commissioner Clark stating that he would not grant this application.

Q. What were you doing in the meantime and before you got that letter from him?

A. We had correspondence with our connecting lines to see, in case they would join us in the rate.

Q. When did you know you were going to put in—when did you know you were to be permitted to put in the rate?

A. On receipt of that letter.

147 Q. Up to the time you received that letter, what was your attitude in the matter?

A. We were awaiting that permission.

Q. Waiting on the Interstate Commerce Commission?

A. We couldn't do anything without that permission.

Q. You had the matter up with them and your idea was that you had to wait until you heard from them?

A. That is the law; yes.

Q. Mr. Sargent, having in your mind the whole situation, do you know whether or not you used your best efforts to put in an emergency rate on that commodity?

Mr. RODGERS: We object; let him state what he did.

The COURT: I sustain the objection.

Mr. McCORMICK: If the Court please, I will explain the purpose.

The COURT: I think the correspondence speaks for itself.

Mr. McCORMICK: How long have you been connected with traffic matters?

A. About twenty-five years.

Q. How long have you been general freight agent of the Texas & Pacific?

A. Since September first, 1892.

Q. When was the first time you learned that there had been ties shipped out of Louisiana—from Louisiana points under tariffs then in effect?

A. I don't believe I catch your question.

Q. Did you learn that there had been some ties shipped out prior to the amendment of this tariff?

A. Yes, sir.

Q. From what point?

A. My recollection is: Cypress, Chopin and Fouke, Arkansas, the first two in Louisiana.

Q. What did you do with reference to that situation when it came to your knowledge?

A. My recollection is we wired the superintendent at Texarkana in regard to shipments from Fouke, and wrote the other gentlemen, direct, calling their attention to the fact that we had no rate.

148 Q. Is that the letter you wrote (reads witness letter)?

Mr. RODGERS: We object to a part of his answers, saying that he wrote them, calling attention to the fact.

The COURT: I sustain the objection.

Mr. MCCORMICK: We offer the letter.

The WITNESS: That is a copy of the letter written the agent at Fouke.

Mr. RODGERS: We desire to object to the letter.

The COURT: I sustain the objection; it is a communication between the agent—between the general freight agent and another agent.

Mr. MCCORMICK: It is charged and the opinion in the Court of Appeals says that is an estoppel or recognition of our construction of the rate. The fact that these agents down there shipped out the ties, this shows the steps made immediately after he heard what they were doing down there to correct what they were doing. The matter was ruled on different before. This went into the record before.

Mr. CLARK: We urge the further objection that this correspondence as to us is hearsay; the way-bills are evidence and not hearsay. We didn't object to that part of the matter when that correspondence—the correspondence between these two agents is purely hearsay.

The COURT: I am inclined to think so.

Mr. MCCORMICK: We have both parties here that it passed between and it has already been testified and in evidence that we started to load the cars at another point and that they were stopped on advice—it is already practically in evidence.

149 The COURT: The evidence offered is not immaterial, but the offering to prove the point is incompetent and I sustain the objection to it. The letters as to this plaintiff is hearsay.

Mr. MCCORMICK: If the Court please, we feel constrained to except to the Court's ruling.

Q. Mr. Sargent, when you found this out did you—what did you advise the agent about it? What steps did you take?

A. When we noticed from the reports that oak ties were moving from Arkansas and Louisiana to interstate destinations, we called on the agent for explanation as to why he was billing such commodity on which he had no legal tariffs to cover.

Q. What explanation did you get from him about it?

Mr. RODGERS: We object.

The COURT: Is the agent here?

Mr. McCormick: Yes, sir.

The Court: I sustain the objection.

Mr. McCormick: Did you get an explanation from him?

A. I did.

Q. After you got his explanation, what did you do then?

A. We notified him he must not accept any more oak cross ties for interstate destinations, for the reasons that no legal published tariffs to cover the movement of——

Q. Did you learn what rate he was using—applying to these shipments?

A. In the case of the agent at Fouke, he was using a rate promulgated by the Texas Railroad Commission.

Q. To what does that apply?

A. Intrastate; wholly within the State of Texas.

Q. Fouke was in what state?

A. Arkansas.

150 Q. State whether or not that matter was called to the agent's attention?

A It was.

Q. What was he advised with reference to further shipments?

A. To cease making shipments without tariffs to cover.

Q. Agents at other points; what other points—did you learn what tariffs they were applying to the shipments?

A. I don't recollect the exact reasons they gave, but they stated they were applying certain tariffs, in which oak cross-ties were not enumerated, consequently no rate on them.

Q. What did you do?

Mr. Rodgers: We object; that is a conclusion.

The Court: I sustain the objection.

Mr. McCormick: I will qualify the witness further.

The Court: He can't be qualified to give that conclusion; that is an ultimate conclusion for the jury.

Mr. McCormick: I understand an expert could give a conclusion if he states his reason.

The Court: Not when that conclusion is the issue to be ultimately submitted to the jury for its determination.

Mr. McCormick: What did you advise them to do with reference to further shipments?

Mr. Clark: We object; this is a private conversation between the two agents of the defendant.

The Court: I didn't know it was a conversation; there has been no evidence that it was a conversation.

151 Mr. Clark: It is in substance a conversation; not a part of the res gestæ.

The Court: I overrule the objection.

Mr. Clark: We except.

Mr. McCormick: What advice did you give with reference to further shipments?

A. They must not accept or forward any further shipments of

oak crossties without having a specific tariff to cover it.

Q. Mr. Sargent, from your experience in rate making and in construction of tariffs—I will ask you this question, first: I believe you stated you were at the head of the traffic department of the Texas & Pacific Railroad?

A. Head of the freight traffic department.

Q. Who is the party for the Texas & Pacific Railroad Company that construes, formulates and construes tariffs, etc.?

A. The general freight agent.

Q. You occupy that position?

A. I do.

Q. The ultimate decision of matters of that kind are for you?

A Yes, sir.

Q. Were you familiar with the T. & P. tariffs in effect in the fall of 1907, covering lumber and products of that kind?

A. Yes, sir.

Q. Mr. Sargent, from your experience in the business and basing your answer on your experience are you—do you know whether or not the commodity—crossties, are included within the term lumber?

Mr. RODGERS: We object; that is the question at issue here; for the determination of the jury upon this written contract. No man, no matter how long experienced or expert testimony, no matter how expert in his line of business, has any right to testify to the fact that the jury is to determine in their province.

Mr. GLASS: If there is no evidence as to whether crossties
152 are treated or recognized as lumber or whether crossties are a distinct commodity from that of lumber, if there is no evidence to be introduced, I do not see how the jury can determine it, unless they determine it as a matter of law, and the Court of Appeals says that cannot be done.

The COURT: I sustain the objection; I sustained an objection on yesterday to questions substantially like this one.

Mr. GLASS: I understand that was before the witness qualified.

The COURT: The witness will be permitted to state whether, under his construction, he has included—whether he, under his construction of this tariff includes crossties in the commodity of lumber; he is not asked to state whether crossties are lumber; whether he knows.

Mr. MCCORMICK: The question was awkwardly put; it was my intention——

The COURT: Re-frame your question.

Mr. MCCORMICK: Has the question come up for your—for determination within your department, as to whether or not crossties are included in lumber in T. & P. tariffs?

A. It has.

Mr. RODGERS: We object; it is immaterial whether it has come up; whether ties are a separate commodity from lumber.

The COURT: That was a formal question; I will permit him to answer—to state whether or not he has.

Mr. RODGERS: We except.

Mr. McCORMICK: Did you in this instance pass on this question?

153 A. In this particular instance I did.

Q. For the Texas & Pacific Railway?

A. Yes, sir.

Q. What was your decision in the matter?

Mr. RODGERS: We object.

The COURT: I sustain the objection; his action is of record in the documentary evidence introduced.

Mr. McCORMICK: You say the Texas & Pacific does act on your judgment in matters of this kind?

A. Yes.

Q. And on your advice and judgment in this matter how did they treat the question of whether crossties are lumber, in the construction of their lumber tariff?

Mr. RODGERS: We object; it is irrelevant, incompetent and immaterial how the Texas and Pacific *trates* [treats] a certain article of commerce.

The COURT: I sustain the objection.

Mr. McCORMICK: We except to the ruling of the Court.

The COURT: You can have your exception; the question indicated by the Court has not yet been put and that is as far as this witness can go, in the opinion of the Court. He can give his opinion as a man versed in traffic affairs.

Mr. McCORMICK: I thought that was the exact question I asked when originally objected to.

The COURT: It was not.

154 Mr. McCORMICK: From your experience in the business have you formed an opinion as to whether crossties are included in the term lumber?

Mr. RODGERS: We object; it is immaterial and incompetent.

The COURT: He has stated. I will permit the question to stand. There is a very large distinction between permitting this witness to assert that he knows whether or not crossties should be treated as lumber, and permitting him to give his opinion as an expert as to whether in his judgment—not the opinion of the railroad world, but his own opinion as an expert in these affairs, oak crossties should be considered as lumber in a tariff.

Mr. McCORMICK: I asked him if he had formed an opinion.

The COURT: I overruled objection to that.

Mr. McCORMICK: You say you have formed an opinion; what is your opinion, as an expert, as to whether or not ties should be construed as lumber or not?

A. In my opinion a tariff——

Mr. RODGERS: We object.

The COURT: I overrule the objection.

Mr. RODGERS: We except.

The WITNESS: In my opinion a tariff which applies on lumber,

mentioning specific articles that take the lumber rates, would not apply on railroad crossties unless they were specifically mentioned in the tariff.

Q. From your experience can you say, Mr. Sargent, whether crossties have been generally considered as applying in lumber tariffs?

155 Mr. RODGERS: We object. It is not a question of whether it has been considered generally—it is not the question in the case; the question is——

The COURT: I sustain the objection.

Mr. MCCORMICK: Do you know the railroads in this section of the country generally, in the section where this timber was produced, regard ties—do you know how they regard ties as to whether or not they take the lumber rate?

Mr. RODGERS: We object, on the same proposition, and further that the way the railroads regard the commodity is not what the law says—they are governed by law in the making and promulgation of tariffs for interstate traffic; they must follow the law regardless of what conclusion they have arrived at, and the law says and the rules of the Commission says that there must be no distinction.

The COURT: You are getting right now to the point passed yesterday. I am not permitting evidence to go [to] the *the* jury which you insist the law covered. The rulings of the Railroad Commission are not law in a litigated case; it is not controlling; they may or may not be; I take it this is a question that must be determined upon the evidence submitted to the jury under the rulings of the Circuit Court of Appeals; if I am in error, that is yet to be determined; I have given the matter that *c*onsideration [consideration] which opportunity has offered and have reached the conclusion that it is a matter upon which evidence should be introduced.

Mr. RODGERS: The proposition of course goes to the competency of this testimony as to whether or not the railroad commission has authority—it is written in the law——

The COURT: What is written in the law?

Mr. RODGERS: That there must not be any unreasonable discrimination.

156 The COURT: Of course.

Mr. RODGERS: They cannot regard them as a different traffic for as a matter of fact they are the same.

The COURT: Certainly not. He has been permitted to testify what in his opinion they are; I take it that is as far as he may go.

Mr. GLASS: In that connection, your Honor, Mr. Sargent has testified how he—what in his opinion th*a*y [they] are——

The COURT: Another witness testified what in his opinion.

Mr. GLASS: If Mr. Sargent knows how they are considered, if he knows what construction the railroads put upon them as to whether or not a tariff would be accepted—a lumber tariff would be accepted as a tariff on cross ties, I take it it would be competent for him to say so, and say what construction is put upon it.

The COURT: I will adhere to my ruling; you may have your exception.

Mr. GLASS: We except.

157 The Texas & Pacific Railway Company. Freight Traffic Department.

NOTICE.—All rates quoted by this Company are for immediate use and are subject to change without notice, except the printing of Tariffs and posting of same as provided for by law.

E. L. Sargent.
General Freight Agent.
H. L. Redfield.
Ass't General Freight Agent.

DALLAS, TEXAS, *Oct.* 18, 1907.

File 1-A

Mr. P. H. Hearn.
Agent, T. & P., Fouke, Ark.

DEAR SIR: Replying to your favor of the 12th inst. As you have no rates on oak ties, you should not have received them or billed them out. Do not know where you get your authority for the rates billed. Please do not receive any more shipments of this nature until you have a tariff to cover.

Yours truly,

General Freight Agent.

Offered but ruled out.

Form 815.

The Texas & Pacific Railway Co.

Office of ——— ———

FOUKE, ARK., *Oct.* 20th, 1907.

Mr. E. L. Sargent,
G. F. A., Dallas.

DEAR SIR: I am in receipt of communication from Mr. R. B. Ayres, Superintendent, Texarkana, stating that you have written him in regard to me billing oak crossties to Sweetwater and Ft. Worth at a rate of 18c per cwt., and that we have no rate whatever on oak cross ties. He advises me to discontinue billing these shipments until I can confer with you in regard to rates. I have
158 been using lumber rates and our Tariff No. 10121-H, under head of "Texas State Traffic," page 8, mentions cross ties among items taking lumber rates. Please instruct me what rates to use on these shipments for Sweetwater destined for stations on

the K. C. M. O. Ry. beyond, and to Ft. Worth for stations on Colo. Midland Ry. in Colorado.

Yours truly,

J. H. HEARN, *Agent.*

Offered, but ruled out.

The Texas & Pacific Railway Company. Freight Traffic Department.

NOTICE.—All rates quoted by this Company are for immediate use and are subject to change and correction to conform to the legal Tariffs of this Company published, filed and posted as required by law.

E. L. Sargent,
General Freight Agent. File 1-A
H. L. Redfield,
Ass't General Freight Agent

DALLAS, TEXAS, *Oct. 22nd*, 1907.

Mr. P. H. Hearn,
Agent, T. & P., Fouke, Ark. File 2-B

DEAR SIR: Replying to your favor of October 20th.

You have no doubt overlooked the fact that business from Fouke, Ark., to Sweetwater, Fort Worth and other points outside of the State of Arkansas, is interstate business and not state business. Therefore the publications covering Texas State Traffic do not apply on shipments from or to points in Arkansas. As stated in our letter to you of October 18th, we have no interstate rates on oak ties in carloads; therefore, if you are offered any more shipments for Sweetwater or Fort Worth, you should notify shippers that there are no rates in effect and that under the ruling of the Interstate Commerce Commission business could not be accepted for movement on which there are no legal tariffs filed with the Interstate Commerce Commission to cover. If these shippers have some shipments of oak ties which they insist on forwarding, please give us the information, and if shippers will give us sufficient time to establish a tariff under the requirements of the Interstate Commerce Commission, we would probably be in position to establish a rate of 40 cents per hundred pounds, minimum weight 30,000 pounds per car from Fouke to Fort Worth, and 50 cents per 100 lbs. minimum weight 30,000 pounds from Fouke to Sweetwater. However, if such a tariff is issued, it could not be made effective without giving the Interstate Commerce Commission, at Washington, D. C., 30 days' advance notice. Please acknowledge receipt, advise if fully understood and say who are the shippers of these ties.

159

Yours truly,

____ ____,
General Freight Agent.

Offered, but ruled out.

Cross-examination.

By Mr. RODGERS:

Q. Mr. Sargent, you say you instructed Mr. Hinton to call on the American Tie & Timber Company and offer them a rate of fifty cents per hundred pounds to Linwood, Kansas or Kansas City?

A. On oak crossties, carloads.

Q. You offered to put that in?

A. If they wanted us to.

Q. If they would use the rate; you would have put it in promptly?

A. We would have put it in as soon as we could do it legally.

Q. The seventy-five cent rate went to other points?

A. Points in Minnesota, is my recollection.

Q. What was your oak lumber rate at that time to Linwood, Kansas?

A. My recollection is it was in the neighborhood of twenty-four cents.

Q. You wanted to put in a rate of fifty cents?

A. We offered it, we offered to.

Q. Now, Mr. Sargent, you have been general freight agent of the Texas & Pacific since 1892?

A. Yes.

Q. In your supervision of tariffs made by the Texas and Pacific Road, they are required by law to file them with the Interstate Commerce Commission?

A. Yes.

Q. You were thoroughly familiar with the form they required for amendments, supplements, etc.?

A. I cannot say I was personally familiar with all the technicalities. I have a general knowledge of their requirements.

160 Q. You have been filing them eighteen years?

A. Not personally. We have a force of about thirty-eight men in the office, it is a matter of detail.

Q. Their general form?

A. Yes, prescribed by law.

Q. All you have to do is to file for any number you want to cover. The tariff known as 8500-H was in force at the time the American Tie and Timber Company offered to ship their ties?

A. Yes, sir.

Q. You had a through interstate—joint through interstate rates, did you.

A. Yes.

A. [Q.] I mean covering lumber?

A. Yes, sir.

Q. This one covered the points to which we desired to ship stuff?

A. I think it covers Linwood, Kansas, I am not certain of that.

Q. Now, when you put in your application to the Commission to amend the schedule or rate on less than statutory notice, you did not designate that you were amending 8500-H involved in this controversy, did you?

A. We requested to have it cover all tariffs, that would include 8500-H.

Q. When you had finally failed, you had failed to cover 8500-H specifically?

A. Yes, by direction of the Commission——

Q. That was the objection the Commission had to filing your first one, you didn't designate your number of tariff. Mr. Sargent, you make the rate; does the executive department of the company have anything to do with the policy towards certain commodities?

A. The executive department usually directs the entire policy of the road and incidentally the traffic policy, if considered advisable.

Q. Then the policy of the road with reference to a certain commodity, what the rates should be, would be handled by the executive department?

A. The rates would be suggested by them.

Q. You, as head of the freight department, would make rates in accordance with that policy?

A. Yes, sir.

Q. It was the policy of the management that you were following in making your effort to make a fifty-cent rate on oak crossties?

161 A. I don't think the executive department ever passed on the particulars of the rate; when I came to the Texas & Pacific road in 1892, there were no rates published on oak crossties and I never changed the policy, never having been instructed to do so.

Q. When the American Tie and Timber Company commenced doing business you found out they were putting ties along the line of the road, you did take it up with the executive department as to what policy of the road would be towards these people.

A. The policy was already defined, is all I can answer.

Q. Did you or did you not?

A. No, sir; I did not.

Q. Didn't you inquire of Mr. Andrews to ascertain or instruct him to ascertain what the American Tie & Timber Company were doing on your rails, how many ties they were getting out before you passed on this question?

A. I did not.

Q. Did any one within your knowledge, do so?

A. Not that I know of.

Q. Who would have made such inquiry of Mr. Andrews, the assistant superintendent at Marshall?

A. Possibly the tie contractor going over the road, if he noticed other ties being got out and put on the Texas and Pacific railroad, I don't know.

Q. A tie contractor has no authority over Mr. Andrews, has he?

A. He could have asked the question——

Q. I mean some one above Mr. Andrews, who would have him, in whose department would it come, to instruct Mr. Andrews to find out what is being done by these different people—this company?

A. As I understand the operating department, Mr. Andrews, assistant superintendent, reports to the general superintendent at New

Orleans, and he reports to the assistant general manager at Dallas, and he in turn reports to the general manager; that is hearsay.

Q. The general manager is Mr. Thorne, here in Dallas; and Mr. Everman is the assistant general manager. Then, do you know whether any such request was made of Mr. Andrews through any of the departments—executive departments?

A. I know it was not made by my department—beyond that I do not know.

Q. You stated that you had no consultation or communication with the executive department about the tie business for the
162 American Tie and Tumber [Timber] Company, about rates to be put in. I will call your attention to a letter there, exhibit No. 43, with the memorandum?

A. This was made after——

Q. Mr. H. L. R., who is that?

A. Assistant general freight agent.

Q. Mr. Redfield?

—. ——.

Q. That is your instruction?

A. That is a memorandum to him showing what I had written to the Interstate Commerce Commission.

Q. Directing him to write in accordance with your view?

A. No, I wrote the letter myself.

Mr. RODGERS: We offer this memorandum on Exhibit 43 in evidence:

"Mr. H. L. R.: This letter was written after conference with Vice President Thorne and Assistant, Mr. Everman, who after reading extracts from Com. Cockrell's letter, decided that this would be the proper thing to do. Kindly put into effect the views expressed to Com. in my letter. E. L. S."

Q. Now, Mr. Sargent, does this 8500-H, referring to 8500-H, page 76, seems to be the one where it states a list of articles taking lumber rates and higher.

A. Yes, sir.

Q. Now, Mr. Sargent, the Texas and Pacific Railway Company transported yellow pine and sawed ties from mills at lumber rates didn't it?

A. Product of sawmills.

Q. During all this time?

A. Yes.

Q. And does yet?

A. Yes, sir.

Q. Under that lumber tariff?

A. I think they specify in there——

Q. I am asking you what they do; they do that don't they; under this tariff they transport yellow pine lumber and ties sawn at the sawmill, don't they?

A. That is my recollection, that applies on sawn pine ties.

Q. You have been using that ever since it was filed and shipping ties that way?

A. We have been using that tariff ever since it has been filed.

Q. Since 1904. Mr. Sargent, in arriving at your ideas with reference to ties and lumber do you not distinguish as to whether
163 a piece of timber is lumber, whether it is sawed at a sawmill or whether hewn or made by hand?

A. You want my definition, what I would consider it?

Q. I asked you if you make any difference in classifying it if it is made at a sawmill, do you call it lumber, and if made by hand call it something else?

A. The original classifications are not made in the general freight office; they are made by experts.

Q. I am asking you whether you decide with reference to hewn lumber or manufactured by a sawmill?

A. I would not consider everything made by a sawmill was lumber.

Q. Would you consider that the same piece of wood made by a sawmill and made by hand, that one was lumber or both was lumber?

A. No, sir.

Q. You would not? Why the distinction?

A. Well, it is my personal opinion, that is the only thing I can give you; I will have to illustrate it by saying I would not consider——

Q. Just your personal opinion?

A. That is all.

Q. Unless made by a sawmill it is not lumber? Same stock, same size?

A. It would not be classified as lumber.

Q. Now, with reference—I will ask you if that is the reason—that you claim oak railway crossties are not included in the term lumber, that is because they are made by hand?

A. I think that is the reason they are not.

Q. That is the only reason for making the distinction?

A. I think they are in a class by themselves.

Q. Because they are made by hand?

A. No, sir; I think they are classed as railway construction material.

Q. You use lumber in railway construction?

A. Not all lumber.

Q. Don't they use lumber?

A. Yes, it very largely enters into the construction of railways.

Q. Mr. Sargent, a piece of oak——

The COURT: Have you got a tariff on railway construction material.

A. Not now, not as such.

Q. Did you ever have?

164 A. Yes, sir.

Q. A tariff covering railway construction material?

A. In years gone by, your Honor, there was a great many tariffs

made for railway construction material and building of new roads—in fact, before the Interstate Commerce Commission, when a new road was to be built, as a rule the contractor went to the railroads and asked for rates on construction material for the construction of a particular road.

Q. You have no such tariff in now?

A. No, sir.

Mr. ROGERS: You had in 1904?

A. No, sir.

Q. You have had none since the Interstate Commerce Commission—since you have had to file them with the Interstate Commerce Commission?

A. I think not.

The COURT: Why don't you have a tariff now on oak ties?

A. I think I testified that when I came to the road there was no——

The COURT: I know what you testified, I asked why you don't have it now?

A. I don't consider it necessary. I don't think of any other answer.

Q. Don't you know of any other reason than you don't think it was necessary?

A. I don't think it was the policy of the executive head of the road to encourage the moving of oak ties off the line of the Texas & Pacific at low rates.

Q. That policy was represented in an offer to put in a fifty cents per hundred pounds rate?

A. That was made it was never acted upon.

Q. Why did you offer to put in a fifty cents per hundred rate, that was to discourage rather than to encourage the shipment of oak cross ties?

A. I don't believe it could be called encouragement; I don't think I can say that it was to encourage.

Q. Was it to discourage?

A. At the time the rate was offered we had no rate of any kind that was—that would be a reduction.

165 Q. That would be a reduction from what?

A. From a combination of local rates.

Q. On crossties?

A. Yes, sir.

Q. Then the—would that be—conceding that cross ties were not to be taken—regarded as lumber, would the fifty cents per hundred pound rate, when the lumber rate for the same service was 24 cents, would fifty cents for oak cross ties be a fair through rate?

A. I would not concede they were to be classed as lumber, if we admit them to be classed as lumber, we would put in the same rate.

Q. I don't care to have a battle of words here——

A. I thought you asked that question.

Q. I say that conceding that oak cross ties are not to be considered as lumber, but taking into consideration the character of the commodity, to-wit, oak cross ties, would fifty cents per hundred pounds

be a fair through rate when the rate on lumber was twenty-four cents per hundred pounds, a fair and reasonable rate?

A. Considering the value of each commodity, I would say it was not well proportioned; I think, my idea in putting in that rate was——

Mr. GLASS: We have no disposition to object, your Honor, as far as we are concerned, as far as this case is concerned, we may as well concede that fifty cents would be an unfair and unjust rate, if it had been put in and published; the question is not what was a fair rate; the question is whether or not they had in any rate. The Supreme Court held in 200 United States that there is no law that requires them to put in a rate beyond their own line——

The COURT: The witness has testified that the policy was in effect when he came to the road and that he left it as he found it; I simply, my examination simply went to the point of ascertaining what that policy was.

Mr. MCCORMICK: I understand that this proceeding is not for discrimination for not putting in any rate, but for discrimination for failure to apply the rate they claim was in existence. While we think the Court's inquiry for that reason is immaterial still we don't object.

166 Mr. RODGERS: Do you concede that a fifty-cent rate is unfair?

The COURT: Counsel insists that it is immaterial. The question is, did they have a rate.

Mr. RODGERS: When you did put in a rate, or when you did file what you call an amendment to this 8500-H, you put in the same rate on these ties that you had on lumber? Did you not?

A. By instructions of the Interstate Commerce Commission, yes.

Q. This is the amendment which you put in which affected that result—number 5, supplement 160 I. C. C.——

A. This put in rates on cottonwood and willow ties.

Q. This is page No. 3 of supplement 172 I. C. C., No. 792, to lumber tariff 8500-H?

A. Yes, sir.

Q. 8500-H was your number?

A. Yes, sir.

Q. 792 was the I. C. C. number?

A. Yes, sir.

Q. In that you gave the same rates that you gave to any kind of lumber, except walnut, cherry, etc.?

A. Everything that 8500-H applied on.

Q. You stated that other companies joined in making that rate? What companies?

A. The list is on the first page.

Q. The list on the second page?

A. Yes, sir.

Q. How do these companies join when you file a tariff with the Interstate Commerce Commission?

A. In a great many ways; some of these tariffs are issued indi-

vidually by us, and we get the concurrence of the various lines that participate; other tariffs are prepared by the various railroads.

Q. In other words, one man prepares the tariffs?

A. Yes, that belongs to the association. This 8500-H was, my recollection was filed individually; that is not what is called an association tariff; that was filed by ourselves; we got the concurrence of the various lines.

Q. That was made before——

A. This was before the association published this lumber rate.

167 Q. You don't have to get the concurrence of all the roads for each amendment you file?

A. Yes, sir; every one.

Q. How do you obtain it?

A. Write direct to them.

Q. When — this matter up first?

A. I can't give the exact dates. After the Interstate Commerce had signified its desire for us to make the same rates on oak cross ties as we had on lumber, we took it up with our various connections affected by this tariff and asked them to give their concurrence.

Q. You didn't take it up until after the Commission said you had to give the same rate on ties that you had on lumber?

A. No, sir.

Q. That was some time the latter part of December?

A. I don't recollect the date, the records show.

Q. The letters here show?

A. Yes.

Q. Then you took it up with them and got their consent, did you have any trouble in getting it?

A. The tariff was effective February 16?

Q. When was it issued?

[A.] January 13th.

Q. Issued January 13; then inside of ten or fifteen days you had gotten all these companies to agree?

A. I can't give the exact date.

Q. Didn't these parties communicate by letter?

A. My recollection is, in correspondence we showed them it was the desire of the Interstate Commerce Commission, I don't think any one of them demurred.

Q. Were you familiar with the rules and decisions of the Interstate Commerce Commission, as general freight agent of the Texas and Pacific Railroad?

A. Reasonably so; I try to read them.

Q. Try to keep up with its holdings?

A. Yes, sir.

Q. And have since you have been in your present office?

A. Yes.

Q. It is practically imperative to do it?

A. I should have a general knowledge of it.

Redirect examination.

(By Mr. GLASS:)

Q. In connection with your general knowledge of the rul-
168 ings of the Interstate Commerce Commission, were you familiar with the ruling issued in their tariff—Circular 14-A, effective June, 1907, directing how the forms and how the tariffs should be made up?

A. Yes, I read that very carefully when it came out.

Q. Now, this lumber tariff that has been under discussion, 8500-H, is a commodity tariff? Is lumber a commodity, is it or not, as distinguished from class tariffs?

A. As distinguished from class tariffs, yes.

Q. Now, in making this commodity tariff did you or not undertake to make—to specify the commodities without undertaking to apply the rate on analogous articles?

Mr. RODGERS: We object; the tariff is here and specifies certain articles taking lumber rates and higher, and speaks for itself.

The COURT: I sustain the objection.

Mr. GLASS: What is your definit*at*ion [definition] of lumber? Mr. Rodgers asked you what you considered lumber?

A. The word lumber, my understanding is it would be a manufactured article of various products, manufactured by a sawmill.

Q. By a sawmill; sawed lumber; timber sawed into merchantable shape?

A. That is my idea.

Mr. GLASS: I would like to offer this rule of the Interstate Commerce Commission in that connection, which reads as follows:

"6. The term 'common points' shall not be used in any tariff for the purpose of indicating the points from or to which rates named therein apply unless a full list of such points is printed in the tariff or specific reference is given to the I. C. C. number of the issue that contains such list. The term 'grain products,' 'forest products,' 'petroleum and its products,' 'cottonseed products,' or similar terms must not be used in any tariff for the purpose of indicating the articles to which the rates apply, unless a full list of articles intended to be included in and covered by such terms is printed in the tariff or specific reference is given to I. C. C. number of issue that contains such list.

169 "Commodity rates must be specific and must not be applied to analogous articles."

Mr. MCCORMICK: Mr. Sargent, as originally promulgated, does this tariff contain any provision as to ties? Are you familiar with the making up of tariffs?

A. I don't say that I am; there is a page there, pretty well toward the back that specifies the rate on lumber, and then gives a list on which lumber rates apply; it speaks for itself.

Q. Is that the only page in the orignal tariff showing the application?

A. Yes, page 76, of 8500-H.

The COURT: That is before the jury as I understand it.

Q. "Application of rates. List of Articles Taking Lumber Rates and Higher.

"Rates named herein will apply on lumber (excepting butternut, cherry, walnut and foreign woods of value); also the following articles when manufactured of woods other than butternut, cherry, walnut or foreign woods of value, in straight or mixed carloads."

Then follows a lengthy list of articles in which ties do not appear.

Q. Mr. Sargent, this tariff I see here is amended from time to time; I wish you would examine it and say when ties first appeared in the tariff?

A. Supplement 172 is the amendment. Effective February 16, 1908.

Q. That is the first?

A. That is the first time made effective.

Q. Oak?

A. Yes, sir.

Q. When was it effective on gum and willow?

A. Effective on line and then we put in rate on gum and willow effective October 18, 1907.

Q. Look at page 6, supplement 159, does that show ties?

A. "Pine cross ties, cypress cross ties, effective, March 15, 1907."

Q. Is that the first time that appears?

A. Yes, sir.

Q. What was added in that supplement?

170 A. Pine and cypress cross ties.

Q. Supplement 170 and see if you see what that provides as to ties and when it was effective? Supplement 170, page 5?

A. Page 5 adds gum cottonwood and willow cross ties.

Q. When did that become effective?

A. This supplement 170 became effective October 5, 1907.

Mr. RODGERS: This is the one you filed when the Blocker-Miller complaint matter was up?

A. Yes, I suggested to the Commission, I think it is all mentioned in the correspondence.

Mr. MCCORMICK: Refer to page 3, supplement 172; does that provide anything further with reference to ties?

A. Wood railroad cross ties, carloads. Effective, February 16, 1908.

Q. Prior to the time this supplement added cross-ties to the general lumber tariff, what had ties been considered in your usage as a commodity or class?

Mr. RODGERS: We object. We object to what they had been considered in his usage—as a commodity prior to the filing of this supplement——

The COURT: What is the objection?

Mr. RODGERS: It is incompetent, irrelevant and immaterial.

The COURT: I sustain the objection; I don't see that it is.

Mr. MCCORMICK: He was asked a while ago and testified that lumber—that this was a commodity tariff.

The COURT: Yes.

Mr. MCCORMICK: It has been shown that prior to a cer-
171 tain time ties were not indicated in the lumber tariff; I simply want to show that prior to the time they were included in this commodity tariff—what was the status of the tariffs——

The COURT: I will permit the question.

Mr. RODGERS: We except.

Mr. MCCORMICK: Prior to the time pine ties were included, what provision——

A. We didn't understand that unless specifically mentioned in the lumber tariff that there was any rates at that time.

Q. Have you ever had any rates on ties not included in the lumber rates?

A. We put in interstate rates on ties specifically mentioned, my recollection is——

Q. Was that a class rate or commodity rate?

A. Commodity.

Q. Had they been treated as a commodity and took class rates——

A. No, they were considered a commodity by themselves

Q. Considered by you as a particular commodity and had been so treated up to the time this amendment took effect?

A. Yes, sir.

Q. The latter—what are they treated as now?

A. A commodity.

Q. Still treated as a commodity?

A. Yes, included with the commodity of lumber, by specific reference.

Recross-examination:

Mr. RODGERS: You call lumber rate—Joint Through Rate 8500-H, you call that a commodity rate—tariff?

Mr. GLASS: Just a moment, Mr. Rodgers. (Mr. Glass and Mr. McCormick confer.)

Mr. MCCORMICK: Mr. Sargent, have you made any provision, or is there any provision made among railroads generally, for the correction of any error that might arise in the application of rates?

172 A. Every railroad has an accounting department, and revising department, for revising rates placed on way bills. They are furnished by the freight office a copy of all freight tariffs and the revising clerk checks the rates in the tariff as against the rates in the way-bill.

Q. In a shipment moving over two lines, what is the custom as to which road does the revising of the rate?

A. Both roads should revise the rates, but as a rule the delivering line is supposed to be responsible for the tariff provision in the rate.

Q. If a rate has been found wrongfully applied, what is the course taken?

A. The revising clerk sends notice to the agent and corrects it to the proper figure.

Q. Is there any general provision made among railroads for the inspection of application of rates?

Mr. RODGERS: What is that?

Mr. MCCORMICK: I asked if there was any provision made under the direction of the Interstate Commerce Commission with reference to the inspection of the application of rates. Is there such a provision?

A. There is.

Q. Do any agents, or purporting to act under the authority of the Interstate Commerce Commission visit the Texas & Pacific and other roads for that purpose?

A. We have—the Texas & Pacific employs what is known as tariff inspector; he is supposed to revise every interstate tariff at every station once in six months.

Q. He travels around from station to station for that purpose? How long has that been in effect?

A. My recollection is a little over a year.

Q. Why was that put into effect?

Mr. RODGERS: We object; it is immaterial.

Mr. MCCORMICK: The object of this testimony is to show that it was impossible to control a scattered agency and keep them in line, and it was necessary in order to do that to have a general supervisor go around and see if they were applying the rates correctly.

173 The COURT: At a time subsequent to this time?

Mr. MCCORMICK: It is at a time subsequent, but I ask why it was not done prior to this year.

The COURT: For that restricted purpose I will permit the witness to testify.

Mr. RODGERS: We except, because it is incompetent and immaterial to any issue in this case, and further because the witness has stated that the inspector was not employed at the time this occurred.

The COURT: That is true, and it is admitted in evidence for the purpose of showing the method of doing the work; it is simply a circumstance and does not bear upon the facts of this case, save as a circumstance.

Mr. MCCORMICK: What was the reason and object of appointing and putting a man in that work?

Mr. RODGERS: We object; he stated they had one and he inspected these places every six months; we renew our objection.

The COURT: I believe I will sustain the objection.

Mr. GLASS: In order that our exception may be understood by the Court, we have read the rules of the Interstate Commerce Commission and what we propose to prove by this witness was, that this was suggested by the Interstate Commerce Commission to keep up with agents and correct mistakes.

The COURT: Very well; proceed, gentlemen.

Mr. GLASS: We except.

174 Mr. RODGERS: I will ask you this question: This 8500-H tariff is a commodity tariff?

A. Yes.
Q. What commodity, lumber, and not ties?
A. On the commodity lumber and articles taking lumber rates?
Q. Lumber in its generic sense is—certain specified articles?
A. I don't believe I quite catch the drift of generic, I don't understand the word.
Q. Generic, the term lumber—then would you use it as a commodity?
A. We use it on the commodity of lumber and articles specified in it taking lumber rates.
Q. And articles taking higher than lumber rates?
A. Yes, sir.

The defendant, The Texas & Pacific Railway Company offers in evidence the following portions of tariffs as described below, viz:

Joint Through Lumber Tariff, T. & P. No. 8500-H, I. C. C. No. 792, title page, also index No. 4417, showing Linwood, Kansas, note E. G. H., route 11, 24, 54, and rate 24, shown on page 57; Note A, under application of rates, page 65; pages 70 and 71 also showing application of rates; pages 76 and 77, showing a list of articles taking lumber rates and higher; pages 78 and 79 showing routing instructions.

Title page, also the following items shown on page No. 4, to Supplement No. 148, to Lumber No. 8500-H, viz:

"Application of Rates—Articles Taking Lumber Rates.—Add "sawed pine and cypress cross ties to list of articles "taking lumber rates as shown in Tariff."

The above being effective August 28th, 1906, as shown on title page alluded to.

Title page, also the following clause on page No. 6 Supplement No. 159 to Lumber No. 8500-H, viz:

"Effective March 15th, 1907. (Reissue.) Articles Taking Lumber Rates—Add Pine Crossties and Cypress Crossties to list of "articles taking Lumber Rates as shown in Tariff, as amended."

175 Title page, also the following item appearing on page No. 5 to Supplement No. 170 to Lumber Tariff, No. 8500-H, viz:

"Application of Rates—Articles Taking Pine Lumber "Rates—Add gum, cottonwood and willow crossties to list "of articles taking yellow pine lumber rates, as shown "in Tariff, as amended."

The above being effective October 25th, 1907, as shown in title page alluded to.

Title page, also the item shown on page No. 3, to Supplement No. 172 to Lumber No. 8500-H, reading:

"List of Articles Taking Lumber Rates and Higher—Add "the following list of articles taking lumber rates shown "on page No. 76 of tariff, as amended:—Wood railroad "cross ties, all kinds, carloads."

Which change was effective February 16th, 1908, as shown on title page alluded to above.

In addition thereto the following portions of the following issues are also offered in evidence, viz: The Western Classification No. 43,

I. C. C. No. 1, issued October 1st, 1907, effective October 1st, 1907, reprint of the Western Classification No. 42, page 116, Item No. 10, which provides as follows:

"Ties, Railroad (Wood). Subject to regulations and "rates in tariffs of the individual carriers."

Title page of amendment No. 6 to T. & P. JB-66-A (I. C. C. No. 1626) and that portion of page 2 thereof, reading as follows:

"Effective October 3rd, 1906.

(Reissue in part of Amendment No. 5 to J. B. No. 66-A (I. C. C. No. 1409).

Rates in Cents per One Hundred Pounds.

On Pine Lumber, Sawed Pine Cross Ties, Sapling Pine Poles for Mining Timbers, carloads, Minimum Weight 30,000 Pounds;
176 from Points on T. & P. Ry. in Texas, Louisiana and Arkansas, Alexandria, La., and West; to El Paso, Texas, when destined points in Arizona and New Mexico. Proportional Rates, 18.

On Telephone Poles, Carloads, Minimum Weight, 30,000 Pounds; from Points on T. & P. Ry. in Texas, Louisiana and Arkansas, Alexandria, La., and West; to El Paso, Texas, when destined points in the Republic of Mexico. Proportional Rates, 18.

Also that portion of Supplement No. 19 to Lumber Tariff T. & P. No. 5-A (Supplement No. 18 to I. C. C. No. 1401) reading as follows:

"Refer to above described Tariff and add as follows:

Effective June 27th, 1907.

(Reissue I. C. C. No. 1693, Amendment No. 8 to J. B. No. 66-A.)

Rates in Cents per One Hundred Pounds.

On Pine Lumber, Pine Cross Ties, Sapling Pine Poles and Mining Timbers, Carloads, Minimum Weight, 30,000 Pounds; from Points on T. & P. Ry. in Texas, Louisiana and Arkansas, Alexandria, La., and West; to El Paso, Texas, when destined points in Arizona and New Mexico. Proportional Rate, 18.

Attach this to the Tariff and make it a part of same.

E. E. SMYTHE, a witness for the defendant, being duly sworn, testified as follows:

(By Mr. MCCORMICK:)

Q. Your initials are?
A. E. E.
Q. You live at Kansas City?
A. Yes, sir.

Q. Have you any position with the Kansas City Southern Railroad Company?

A. General freight agent.

Q. How long have you been general freight agent of that road?

A. Eight years.

177 Q. How much experience have you had in the construction, formation and interpretation of railroad tariffs and schedules?

A. For about eleven years.

Q. Have you had charge of that part of the business for the Kansas City Southern since you have been general freight agent of that road?

A. Yes.

Q. Are you familiar with the rules for the formation and promulgation of tariffs as practiced by railroad companies now?

A. In a general way, yes.

Q. Mr. Smythe, basing your opinion on the experience you have had in the line inquired about, please state whether or not in your opinion railroad cross ties are included in the term lumber as used in the tariffs and schedules of railroads filed with the Interstate Commerce Commission?

Mr. RODGERS: We object, as incompetent and irrelevant and a conclusion and opinion of the witness in considering a particular tariff—not considering the particular tariff herein involved; this is a question for his opinion generally; the question here at issue is whether or not under this tariff they should have been transported.

The COURT: This is a slightly different question from the question I ruled on this morning. Read the question, Mr. Stenographer?

STENOGRAPHER: Mr. Smythe, basing your opinion on the experience you have had in the line inquired about, please state whether or not in your opinion railroad cross ties are included in the term lumber as used in the tariffs and schedules of the railroads filed with the Interstate Commerce Commission.

The COURT: That is more nearly like the second question put by Mr. McCormick to all of which I sustained objection, than the first of which I admitted.

Mr. MCCORMICK: We except.

178 Mr. GLASS: Basing your opinion, Mr. Smythe, on your experience in the line of work you testified about, do railroad cross ties come under the designation of lumber?

A. They do not.

Mr. RODGERS: We object to that, because it is incompetent for him to testify to his opinion whether or not railroad crossties come under the designation of lumber; this is the question, as I understand it; it is incompetent for any one to testify to that effect where he has an opinion, and of course he couldn't testify unless he had an opinion; but they ask him what is his opinion based upon his experience as to whether or not they do come under the designation of lumber.

The COURT: That is more nearly like the question I admitted. I desire to admit the question I admitted during the morning hour. I will admit the question on the theory that it does not vary.

To which ruling of the Court the plaintiff excepts.

Mr. RODGERS: I think there is this distinction; the question this morning was construing the identical tariff and this is a general question which cannot control in this case, regardless of what his opinion is.

Mr. GLASS: The witness has already answered that it does not.

The COURT: He answered that they do not before objection was interposed.

Mr. GLASS: Mr. Smythe, what is the distance, if you remember, from Kansas City to Horatio, Arkansas?

A. 442 miles.

Q. What is the distance from Kansas City to Neal Springs, Arkansas?

A. Between 448 and 450.

Q. The distance from Kansas City to Frierson, Louisiana?

A. 570 to 580.

Q. 575 to 580: Between 575 and 580?

A. Yes, sir.

Q. Kansas City to Orangeville, Louisiana?

179 A. About 675 miles.

Q. 675 miles?

A. Yes, sir.

Q. Do you know the stations where the American Tie and Timber Company had ties stacked at the sidetracks during the latter part of 1907?

A. I can't recall them now.

Q. In a general way do you know where the ties were generally, along the road?

A. They had—they had a majority——

Q. I am not asking about any one place, if you know where?

A. They were along our line.

Q. What was the average distance from where these ties were to Kansas City?

A. Pretty close to six hundred miles.

Cross-examination.

By Mr. RODGERS:

Q. You mean to say that the average distance was about 600 miles?

A. That is the best of my recollection.

Q. From Kansas City? How far is it from Venice, Arkansas? I will just ask you Texarkana? 448, isn't it?

A. Yes.

Q. Venice is about 80 miles north of Texarkana?

A. Yes, sir.

Q. It is in the neighborhood of 400 miles from Kansas City; that would be about 80 miles.

The COURT: What is the purpose of this testimony?

Mr. GLASS: The purpose of this testimony is, we introduced evidence yesterday that we expect to follow up with tariff showing that the breach of this contract by the Union Pacific Railroad Company was the cause of the damage, if any. The Court will doubtless control that in your instructions to the jury.

The COURT: Very well; proceed.

Mr. RODGERS: Neal Springs, Horatio, Allene, Log Spur and Ogden are all in Arkansas, and north of Texarkana?

180 A. Yes, sir.

Q. Texarkana is 488 miles from Kansas City. State whether or not in September, October, November and December, up to the 17, 1907, the Kansas City Southern had in a joint through tariff rate which they would apply on oak railway ties to Linwood, Kansas?

Mr. GLASS: That is December 5, do you want to correct that?

Mr. RODGERS: No.

A. No joint rate on oak ties to Linwood, Kansas.

Q. Did you have any rate of any kind during that period?

A. We had a pine lumber rate——

Q. I mean covering oak railway ties?

A. We had rates from stations Texarkana and north to Kansas City.

Q. You mean rates on your own rails?

A. Yes, sir.

Q. Had no joint through rates?

A. No, sir.

Q. What was the rate on your own rails from Ogden, Arkansas, north to Kansas City?

A. I would not attempt to say without the tariff.

Q. Did you have rates put into effect December 5, 1907, from all stations in Louisiana and Arkansas to Kansas on your own line?

A. We did.

Q. What was that rate?

Mr. GLASS: The rate itself is the best evidence.

The COURT: If he knows.

A. I don't recollect all the figures.

Mr. RODGERS: Was it not a blanket rate of 23 cents from these stations? You can answer my question from this—twenty-three cents from all these Louisiana and Arkansas points? (Hands witness tariff.)

181 A. Twenty-three cents per one hundred pounds.

Q. You handled oak lumber at the same time from these stations to points in Kansas and Linwood, Kansas, at twenty-four cents, didn't you?

A. In tariff 216-D, Joint Through Tariff, the application of oak lumber rates——

Q. I am asking you if you didn't handle oak lumber?

A. I am trying to answer your question.

Q. I am asking you if you didn't handle oak lumber under tariff 216-D to Linwood, Kansas, on the 24-cent rate?

Mr. GLASS: We admit it.
Mr. RODGERS: I want him to state it.

A. Whatever the tariff was.
Q. You remember this rate, don't you?
A. The rate was changed in that territory; and I should think twenty-four cents was the figure.
Q. Now, your joint tariff 216-D, December 5, 1907, you put in a rate covering oak railroad cross ties on your own line of twenty-three cents from these same stations to Kansas City?
A. Yes, sir.
Q. Do you know anything about tariff T. & P. 8500-H, filed with the Interstate Commerce Commission, effective June 1, 1901?
A. Only from what I have heard, I never examined it.
Q. Examine this and say whether or not your road was a party to that contract—to that tariff.

Mr. GLASS: I cannot see the object of it; the Kansas City Southern is bound by that contract, would be if it participated in the tariff; the tariff is from points on the Texas and Pacific Railroad, there is no dispute about that; I cannot see the object of the testimony. Of course, lumber coming from points on the Texas & Pacific railroad to points on the Kansas City Southern—passing over it to its connections, the Union Pacific and from the Union Pacific to Linwood, moved under that tariff, of course.
The COURT: I don't know the purpose of it. I will permit the evidence.

182 Mr. RODGERS: It is a party to the tariff?
A. It is a party to the original tariff.
Q. Both on the front page and on the enumeration of the action of each railroad that is a party to it, it shows the authority of E. E. Smythe, General Freight Agent, is that you?
A. Yes, sir.

Redirect examination.

Mr. GLASS: You say you were a party to the original tariff? Filed in 1901?
A. Yes, sir.
Q. Were you a party to the tariff applying on oak railroad cross ties filed in 1908?
A. We were not.

Mr. RODGERS: Were you requested to become a party to it?
A. I cannot answer that offhand.
Q. I would like to know.
A. We get about five hundred communications a day and it is hard for me to remember them all.
Q. Your company is sued by the American Tie and Timber Company for the same thing the Texas and Pacific is, that is, for not applying the lumber rate to ties at the same time, now don't you

know whether or not you were applied to by the Texas & Pacific Railway Company to join in that amendment?

A. No, sir; I do not.

Q. You don't? That is all.

S. G. REED, a witness for the defendant, being duly sworn, testified as follows:

By Mr. GLASS:

Q. You live at Dallas, Mr. Reed?

A. Yes, sir.

Q. Are you in the railroad service, Mr. Reed?

A. Yes, sir.

Q. What railroad?

A. The Houston and Texas Central.

Q. What occupation?

183 A. Assistant general freight agent.

Q. How long have you been in the traffic department of the Houston and Texas Central Railroad.

A. With the Texas Central—Houston and Texas Central Railroad since October, 1906.

Q. What experience have you had in the formation and promulgation of and interpretation of railroad tariffs and schedules?

A. I have had very little experience in the construction, but considerable experience in the interpretation of tariffs. I have been in the railroad service for twenty-one years.

Q. In that service has it become necessary for you to pass upon and construe tariffs on your own road as well as other railroads?

A. Yes, sir.

Q. Mr. Reed, I will ask you what in your opinion, if you have any, based upon your experience and service in the line of work just indicated as to whether or not railroad cross ties are included within the term lumber?

Mr. RODGERS: We object; that is incompetent and an opinion, if he has any, as to whether or not oak cross ties are included within the term lumber, is the identical question the jury is to determine; he cannot testify on that proposition. I don't think the question was shaped in accordance with the former ruling of the Court.

Mr. GLASS: I think it is, your Honor.

The COURT: Repeat the question, Mr. Stenographer.

STENOGRAPHER: Mr. Reed, I will ask you what is your opinion, if you have any, based upon your experience and service in the line of work just indicated as to whether or not railroad cross ties are included within the term lumber?

The COURT: I sustain the objection.

Mr. GLASS: We except.

184 Mr. GLASS: I will ask you what is your opinion based upon your service and experience in the construction of freight tariffs as to—mark that out Mr. Stenographer—basing your opinion upon the service—your service and experience in the con-

struction of railroad freight tariffs, do railroad cross ties come within the term lumber?

Mr. RODGERS: We object to that; he asks the very question this jury is to determine.

The COURT: It seems to me there are a good many questions for the jury to determine; this is a different question that is construction of tariffs; he may give his individual opinion. I overrule the objection.

Plaintiff excepts.

Mr. GLASS: Repeat the question, Mr. Parker.

STENOGRAPHER: Basing your opinion upon the service—your service and experience in the construction of railroad freight tariffs, do railroad ties come within the term lumber?

Mr. RODGERS: We make the further objection that his opinion is not competent evidence in this case.

The COURT: Answer the question.

The WITNESS: I would say in answer to that that ties are not generally considered—I have never considered——

Mr. RODGERS: Wait a moment——

WITNESS: I don't consider and have never considered, in interpreting tariffs that lumber, that it included ties unless it specifically mentions ties.

185 Cross-examined.

By Mr. RODGERS:

Q. How long have you been connected with the Houston and Texas Central Railroad in your present capacity?

A. In my present capacity I have been with them only since January 1, 1910; I have been in the present position—Division Freight Agent prior to that time; since January 1, Assistant General Freight Agent.

Q. Who is the general freight agent?

A. Mr. J. R. Christian.

Q. How long have you been in Texas?

A. Twenty-four years.

Q. With the H. & T. C.?

A. With the Southern Pacific prior to my connection with the H. & T. C.

Q. When did you go with the H. & T. C.?

A. October, 1906.

Q. A little over two years?

A. A little over three years.

Q. With the Southern Pacific before that?

A. Yes, sir.

Q. What capacity?

A. I was division freight agent at Lake Charles and Lafayette and prior to that time I was chief clerk of the New York, Mexican & Texas, at Victoria.

Q. What discretion, if any, have you with reference to making up tariffs?

A. What discretion have we as to making up a tariff?
Q. Yes; as to fixing the rate?
A. It would depend, altogether, what character of tariff, whether state or interstate as to what discretion.
Q. What discretion for interstate rates, I mean you?
A. I have none.
Q. None, whatever?
A. No, sir.
Q. You are not the man who promulgates tariffs, except the routine work?
A. I didn't say I made or promulgated——
Q. Formulate?
A. Interpret.

The COURT: He has testified he did not make them or have the authority to make them.

186 Mr. RODGERS: You are in the position of interpreter?
A. Yes, sir.
Q. For whom?
A. General public, for our agents.
Q. Don't you interpret them for the railroads? The railroad that you are working for?
A. No particular railroad in quoting tariff rates——
Q. Your interpretation has been used sort of—used to tell what the railroad company wanted to mean by it?
A. What the tariff means, according to my opinion.
Q. That is the only way you interpret for the public? In other words, how your company would enforce them?
A. Yes; how they should be construed to comply with the law.
Q. Was it a question of complying with the law as much as complying with the policy of your company you were pursuing?
A. The policy of the company is to keep strictly within the law.
Q. Always?
A. Yes; try to.
Q. The policy of the company is also to look after the interest of the company, is it not?
A. Of course, we look after their interest; yes.
Q. It comes first, don't it?
A. I don't know that it always comes first, the public has an interest.
Q. General result is it comes first?
A. That is what they are after, general results.

The defendant here interposed an objection.
The COURT: I sustain the objection to that line of questioning.

Mr. RODGERS: You don't know how the Texas and Pacific construe their tariffs?
A. No, sir.
Q. You know nothing about it?
A. No, sir.

Mr. GLASS: We want to introduce this tariff—certified copy of K. C. S. tariff— —

187 Mr. RODGERS: We want to ask another question.

Q. Where are the general offices of the Houston and Texas Central Railroad?
A. At Houston?
Q. You are here?
A. Yes.
Q. You live here?
A. Yes.
Q. The general offices are down there?
A. Yes, sir.

Mr. GLASS: We introduce in evidence certified copy of K. C. S. Freight Tariff No. 878-D issued November 1, 1907, effective December 5, 1907, on ties, wooden, except yellow pine, in carloads, stations on Kansas City Southern, to Kansas City, Missouri, as shown on page 3. On page 3, rate from Allene, Arkansas, to Kansas City is 19 cents per 100 pounds; from Horatio, Arkansas, 19 cents per 100 pounds; Grannis, Arkansas, 19 cents per 100 pounds. From Frierson, Louisiana, on down to Port Arthur, Texas, all stations South of Texarkana, 23 cents per 100 pounds.

Mr. RODGERS: We object, it is irrelevant, incompetent in this case; I don't see that it operates to determine any issue.

The COURT: I don't catch your objection.

Mr. RODGERS: It is admitted it is only a rate for their own rails; the testimony shows we tried to ship to Linwood, Kansas.

The COURT: I will control the effect of the testimony later.

Mr. RODGERS: We want to save the exception.

188 GEORGE T. ATKINS, a witness for the defendant being duly sworn, testified as follows:

By Mr. MCCORMICK:

Q. What are your initials?
A. G. T., Junior.
Q. Where do you live, Mr. Arkins [Atkins]?
A. Dallas.
Q. What business are you engaged in?
A. Railroading.
Q. What capacity?
A. Chief clerk of the general freight agent of the M. K. & T. of Texas.
Q. General office of the Katy—M. K. & T., here at Dallas?
A. Yes, sir.
Q. You are the chief clerk to the general freight agent?
A. Yes.
Q. What experience, if any, have you had, Mr. Atkins, in the formation of or promulgation of railroad tariffs and in the interpretation and construction of railroad freight tariffs?
A. Well, in the actual issuance and promulgation of tariffs, about six years and about nine years in the construction of them; but for a period of six years I was actually engaged in issuing and constructing tariffs under the direction of the general freight agent.

Q. Who does that work, who has direct supervision of the work of issuing and promulgating interstate tariffs for the Katy railroad?
A. The general freight agent.
Q. What I want to get at is, who does the work, who does the work?
A. It is made under his supervision; I do, under his supervision.
Q. You are under the general direction of the general freight agent?
A. Yes; carry out his policy.
Q. Mr. Atkins, I will ask you if in your opinion, based upon your experience in the formation and promulgation of railroad tariffs, freight tariffs and in the construction and interpretation of railroad tariffs if railroad cross ties come within the definition of lumber?

Mr. RODGERS: We renew our objection.
189 The COURT: I overrule the objection.
Mr. RODGERS: We except.

The WITNESS: Now, repeat the question.
Mr. MCCORMICK: Do railroad cross ties, in your opinion, based upon your experience in the formation and promulgation of freight tariffs, come within the meaning of lumber?
A. They do not.

Cross-examined.

By Mr. RODGERS:

Q. Is that the railroad construction of it? Is that the construction of men connected with the railroads?
A. I think it is.
Q. You speak from that standpoint?
A. I do; yes.
Q. The railroads are large users of oak cross ties in this section, are they not?
A. I don't know whether——

Mr. MCCORMICK: This is the same line gone into before, we submit that it is entirely irrelevant.
The COURT: I will permit the witness to answer the general question, but not go further into it.

The COURT: Answer the question.
A. I don't expect oak ties are entirely used——
Mr. RODGERS: I didn't ask you that. The question is, is it not a fact that railroads in this section are large users of oak cross ties?
A. I don't believe so in this section, not of oak cross ties?
Q. What kind do they use?
A. Mostly pine.
190 Q. In this section?
A. That is my understanding.
Q. Do you know what the Texas and Pacific uses in this section?
A. I do not.
Q. Do you know what the Kansas City Southern uses along its line from Kansas City to Texas?

A. I do not.
Q. What do you speak from?
A. My general observation of ties only, used in this sectior
Q. The Katy in this section, your road?
A. Yes.
Q. What do they handle, usually, in Texas?
A. Practically all pine.
Q. Creosoted?
A. The best part of them.
Q. Before creosoting became usual, what was used by the Katy?
A. Heart pine, wherever it could be.
Q. Heart pine?
A. Yes.
Q. You are sure of that?
A. To the best of my knowledge.
Q. Do you say they used heart pine as against oak ties in Texas prior to the use of creosoting pine ties?
A. To the best of my knowledge.
Q. Have you any knowledge?
A. Nothing except from observation, as I stated, my testimony is just from my observation.
Q. How much observation?
A. Only what I have gathered from traveling over the state.
Q. You would not testify whether they used oak ties or not before using creosoted ties?
A. I can testify in a general way what the M. K. & T. uses; the bulk of their requirement has been pine ties.
Q. What bulk?

Mr. McCORMICK: We object.
The COURT: I think you have gone far enough.

191 Mr. RODGERS: Your company, the M. K. & T. is a party to this Tariff 8500-H, Joint Through Tariff, is it not?
A. Yes.
Q. Anything shipped under that tariff your company would handle it from the initial road, the Texas and Pacific without question?
A. They would refuse the billing of it, if it was——
Q. If the rate was right?
A. Yes.
Q. Do they have the classification of it?
A. Who?
Q. The initial carrier?
A. No, sir; the destination carrier is presumed to be responsible for the protection of the correct rate.
Q. Of the correct rate?
A. Yes; correct clas-ification.
Q. Whatever they bill it at, whatever they accepted in their protection of the rate, if the rate was correct your road would deliver it under that?
A. If it were correct?
Q. Yes.

A. Yes.

The COURT: What does this purport to be?

A. This is a Joint Through Tariff—Lumber Tariff, making rates on lumber from points on the Texas and Pacific and specified connections in Louisiana and Arkansas to points on various connections.

Q. Is that what you term a commodity tariff?

A. Yes; that is a commodity tariff.

Q. Where do you ascertain in it—you are accustomed to handle this character or tariff or not?

A. Yes, sir.

Q. In the discharge of your duties; where in the course of this sheet—this pamphlet do you ascertain to what articles this commodity tariff is applicable?

A. The articles shown as taking lumber rates.

Q. Where is that, here?

(Some one said, "page 76".)

The COURT: Let him answer; you turn to 76 and refer me to page 76——

192 A. Yes; articles taking——

Q. Are these all the articles to which this tariff shows, applies?

A. Yes, sir.

Q. That this promulgated tariff applies to?

A. That is all they apply to.

Q. That is all they apply to?

A. Articles enumerated therein.

Q. The first—the head of that is articles taking lumber rate and higher. Underneath that is as follows: "Rates named herein will apply on lumber," then in parenthesis, "except butternut, cherry walnut and foreign woods of value." To what would this tariff apply were that all that was there and no list appended—no list of excepted articles?

A. Well, it couldn't apply, in my opinion, to anything that was not named, as to whether it was lumber, the commission holds that a tariff has got to specify—that the rates cannot be *be* made to apply on analogous articles.

Q. It then proceeds as follows: "Also on the following articles when manufactured of wood, other than butternut, cherry, walnut and foreign woods of value, in straight or mixed carloads." Then follows a list of articles to which it applies. In the construction and interpretation of tariffs, what is the effect of naming certain articles to which the tariff applies as affecting other articles not named, if it has any effect?

A. Well, it would not have any effect on articles not named. It would simply have the effect of making the rates named therein applicable to lumber and articles named taking the lumber rates.

Q. Would be applicable to articles not enumerated?

A. It couldn't be under the Interstate Commerce Commission.

Q. By what process is it determined whether or not a given article

made of wood is lumber and shall fall under the general designation of lumber?

A. Well, as I understand it, it is covered—the trade; articles that are covered—spoken of, sold and handled as lumber; there are some few exceptions, though some articles enumerated in their nature are manufactured, is lumber; interior decorations and such things as that are designated by the lumber trade.

Q. In you- opinion, applying the usage and custom pertaining to the designation of articles classed as lumber, would oak ties be considered lumber?

193 A. I should say under no circumstances unless they were specified.

Q. Why?

A. Well, in the first place, I don't believe they are lumber; I don't believe they are considered such by the commercial trade, that they are not established and understood as such, and in the next place on account of the rule of the Interstate Commission stating that all articles—that rates on all articles must be specific, they cannot be analogous.

Mr. RODGERS: You base your opinion upon the question of whether or not it is manufactured at a saw-mill or hewn from wood?

A. No; I do not.

Q. What is the difference between a 6 x 8 x 8 which would be used for ties and 6 x 8 x 8 to be used in the construction of a building?

A. I don't know that there is any technical difference, except——

Q. 6 x 8 x 8 used in the construction of a building would be lumber?

A. I don't believe it would come under such designation——

Q. A man could specify his dimensions, couldn't he?

A. I believe so.

Q. If he had use for 6 x 8 x 8 made of oak, it would be lumber, would it not? Or, if he called for 6 x 8 x 16 and sawed it half in two it would be lumber?

A. Yes; I should say so.

Q. Whether sawed at the mill or hewn in the woods?

A. I should say it would depend, altogether, to whom consigned and for what purpose; usually, if consigned to a railroad or a railroad company, I would not consider it lumber.

Q. The distinction made in your mind is by reason of the practice of railroads treating it as a secret, so that they can make rates to suit themselves?

A. No; I think not.

Q. Is it not true that the only reason the railroad companies can have for making a different rate on cross ties, and similar pieces of lumber sawed at a saw-mill for another purpose is that they want to regulate the movement of cross ties from their rails by a difference in the rate?

A. No; I cannot say that is true of all carriers.

Q. Is it not true that that is the only valid reason they can have for it?

194 A. I can't say.

Q. That is the reason that there is a different rate on ties?

A. I don't know about that. I don't know whether they are different rates, so far as the M. K. & T. is concerned, generally speaking, our rates applicable on ties are the same as on lumber, but they are specified.

Q. Is it not a fact that your road in joining with other roads on interstate traffic refers the question as to whether rates on lumber, all kinds, will apply on every form of lumber to the initial carriers?

A. No, sir; it does not.

Q. Does not the western classification provide that ties are subject to the regulation of the local carrier?

A. No, sir.

Q. To the initial carrier?

A. No, sir.

Q. You know what I mean by the western classification?

A. Yes, sir; I do.

Q. Gotten up and filed with the Interstate Commerce Commission, you say it does not do that?

A. Not as you stated.

Q. How does it state it?

A. My recollection is it states ties—refers you to the lumber tariff.

Q. Don't have a note, "Ties subject to the individual carrier?"

Mr. GLASS: The classification would be the best evidence.

The COURT: I will permit the examination.

A. To the best of my knowledge the western classification does not state that.

Q. What does it state?

A. It simply refers you to the classification applicable on ties to the lumber tariff.

Q. In answer to the Judge's question, I want to see if I understood your testimony: "Rates named herein will apply on lumber, except butternut, cherry, walnut and foreign woods of value." How do you construe that part to this, anything that comes within the definition of lumber except the woods that are excepted?

A. You mean that refers to the——

195 Q. From reading there, that part——

A. I would consider that to be applicable to shipments of lumber about which there was no dispute.

Q. Anything that is actually lumber and not of the woods that are excepted?

A. Yes, sir.

Q. Then, lumber—that says, "also on the following articles" and then says in heavy type, "When manufactured of woods other than butternut, cherry, walnut or foreign woods of value, in straight or mixed carloads. That is a list of articles manufactured from woods that may not be lumber at all; in other words, they are articles that take the lumber rate?

A. They are articles that take the lumber rate.

Q. Then, when you state it must be specified you mean it must be articles taking lumber rate or higher?
A. Yes, sir.
Mr. GLASS (hands witness document) What is what?
A. That is Western Classification No. 43.
Q. Refer to page 16.
A. Ties, railroads; subject to regular rates carried in tariffs of the individual carriers.
Q. Yes; it does.

Mr. GLASS: Of course, we want to consider that in evidence. Western Classification, page 16, considered in evidence.
Mr. CLARK: May I ask him one question?
The COURT: Yes.

Mr. CLARK: That tariff specified lumber, all kinds, except certain hardwood and "also the following articles?" Do you consider, "and also the following articles" to eliminate from that tariff lumber, all kinds, except hardwood?
A. Yes; all except the articles named.
Q. You do?
A. Yes.

196 Q. Notwithstanding the tariff says, "lumber, all kinds, except butternut, cherry, walnut or foreign woods of value," and then goes on to say, "also the following"—don't also mean—is not that conjunctive and not disjunctive?
A. Yes.
Q. Is it possible for it to mean what you say? Also the following articles, eliminates the preceding classification, is not that impossible?
A. I didn't mean to say that if I did; it would apply on lumber and articles enumerated.
Q. If you stated that you want to correct it?
The COURT: He has stated that a number times, several times, when the question was first put, he stated it as he does now. It is not a matter for correction.

T. M. LUCAS, a witness for the defendant, being duly sworn, testified as follows:

By Mr. MCCORMICK:

Q. Please state your full name to the jury?
A. T. M. Lucas.
Q. You live in Dallas, Mr. Lucas?
A. Yes, sir.
Q. What business are you engaged in?
A. Retail lumber.
Q. What company?
A. Mayfield Lumber Company.
Q. What sort of place with the Mayfield Lumber Company?
A. At present I am in charge of the local office.
Q. Manager of that concern here in Dallas?
A. Yes, sir.

Q. Mr. Lucas, how long have you been in the lumber business?
A. Since 1900.
Q. Have you had experience in handling and shipping lumber of different kinds—all kinds?
A. All those generally used in this section.
Q. Do you handle railroad cross ties?
A. Not in stock, we don't retail them.
Q. Do you know from your experience in the lumber business whether among lumber men, railroad cross ties are considered lumber?

197 Mr. RODGERS: We object.

The COURT: I will permit him to give his opinion as to how he considers them. I won't permit him to testify as to how they are considered.

Mr. McCORMICK: I possibly misunderstood the definition of an expert. I thought the Court said it was a matter of expert testimony.

The COURT: I do consider it so. I will permit him to testify as to his knowledge of the subject, and then what he considers it as an expert.

Mr. McCORMICK: From your knowledge of the handling of the lumber business, do you consider ties as lumber?

Mr. RODGERS: We object.

The COURT: What is his opinion?

Mr. McCORMICK: I asked his opinion as to whether or not cross ties are lumber?

Mr. RODGERS: He does not ask and the witness does not seem to bring out, as I understand it, the question at issue. The testimony does not show this witness handled any railroad cross ties, has never had anything to do with them and knows nothing about them. He handles lumber over here; he don't know whether ties are considered lumber or not, and his opinion as to whether it is or not, is going out into the realm of speculation; it would be just the same as to pick up a man in this Court house——

The COURT: I will sustain the objection at this time until he is further qualified.

198 Mr. McCORMICK: I would like to call attention to the fact that it is already in evidence—the testimony of railroad men that in making up these schedules the term lumber or trade as it was considered by the trade—this man is in the lumber trade; it is shown that he is experienced in the lumber trade. I won't ask that, because the Court has overruled me on that; I now ask him what he individually considers——

Mr. RODGERS: I would like to test him a little; he is not an expert, because he is the manager of the local office——

Mr. McCORMICK: How is lumber sold?
A. By the thousand feet.
Q. How are ties sold?
A. By the piece—tie.

Q. How are—do you ship lumber—have you shipped any lumber?

A. Yes, sir.

Q. Have you ever shipped any ties?

A. Only for the street car company.

Q. What kind of ties were they?

A. Creosoted pine ties.

The COURT: I will permit the witness to testify.

Mr. MCCORMICK: From your experience in handling lumber and ties, are railroad ties lumber?

A. No, sir; we don't carry them——

Mr. RODGERS: We object.

The COURT: I overrule the objection.

Cross-examination:

Mr. RODGERS: You are with the Mayfield Lumber Company?

A. Yes, sir.

199 Q. They have a local yard here?

A. Yes, sir.

Q. Over what roads do you ship most of your stuff?

A. I don't know of any one, specially, about as much over one as the other, most of our lumber——

Q. What road do you ship most of it in to Dallas over?

A. Well, it is—I should guess the H. & T. C. handles more than any one else; the H. & T. C. and the T. & P. and the Katy, about that proportion, the H. & T. C. handles the most of it.

Q. Now, would you call a piece of oak sawed at saw-mill, 6x8x8 lumber?

A. No, sir; lumber lengths generally run in 12 feet for commercial; we don't handle anything on the yard under twelve feet.

Q. You can order from the mill any size you want?

A. Yes, sir.

Q. It would be lumber just the same?

A. If it was manufactured in what we use in construction——

Q. You are talking about what you carry ordinarily in stock. I am talking about what is lumber turned out from sawmill, 6x8x8 would be lumber as much as 6x8x12, would it not?

A. Not to us.

Q. It might not be carried in stock and handled but it would be lumber?

A. It would not be salable lumber.

Q. If a man came to you and placed an order for any number of pieces or any number of feet, you would fill it would you not if you had to have it made?

A. Yes.

Q. If you didn't carry it in stock; then, if he wanted 6x8x16, you would furnish them?

A. Yes, sir.

Q. Or any length he called for?

A. No, sir; yes we could furnish anything from the mill, we would not have anything in stock.

Q. You could get it for him?
A. Yes.
Q. And handle it *is* lumber? Now, — you make any distinction in your opinion about its being lumber as to whether it is the produce of a saw-mill or whether it is made in the woods by hand?
200 A. Yes.
Q. Do you designate anything made by hand as lumber at all?
A. No, sir.
Q. If made by machinery the same size, it is lumber?
A. If it is sawed evenly by machinery, it is lumber.

GEO. W. SIGNOR, a witness for the defendant, being duly sworn, testified as follows:

By Mr. MCCORMICK:

Q. Please state your name to the Court and jury.
A. Geo. W. Signor.
Q. Where do you reside?
A. Shreveport.
Q. What business are you at present engaged in?
A. The tie business principally, railroad material.
Q. Mr. Signor, have you ever been engaged in the lumber business?
A. Yes; handled it in a wholesale way, in carload lots.
Q. Have you been engaged in the tie business in a wholesale way?
A. Yes, sir.
Q. Just state what experience you have had in both, what length of time?
A. I commenced making ties in the year 1867 and 1868, and I have been at it ever since, most of the time. I was on the Missouri Pacific system about thirty-six years in that business.
Q. At what different places were you engaged in and interested in the lumber business?
A. I have carried that on more or less with my tie business, buying and furnishing railroad lumber, *depostations*.
Q. Operating individually or through a company?
A. Well, we have a corporation, independently, though, a good deal of the time; I am president of the company.
Q. What is the name of the company?
A. Geo. W. Signor Tie Company.
Q. Have you ever been a shipper of ties, Mr. Signor?
A. Yes.
Q. To what extent?
A. I can't hardly tell you; I have shipped a good many millions, I think.
201 Q. Have you ever shipped a tie on the lumber rate?
A. No, sir; I never have.

Mr. RODGERS: We object; it is immaterial, incompetent in this case whether he shipped ties on a lumber rate or not. The question

is the construction of this tariff, that is what I understand the opinion to mean, nothing but that.

The COURT: I will permit the question and answer to stand.

Mr. MCCORMICK: On what kind of rates have you shipped ties?

A. The most of the time we always had a tie rate, so much a tie and a minimum carload according to the capacity of the cars.

Q. Do you know from your experience in having shipped that particular class of freight, what ties are designated in freight parlance?

A. I don't understand that quite well.

Q. From your experience in shipping ties, do you know what, in freight parlance, ties are designated, from a freight standpoint?

Mr. RODGERS: We object; freight parlance does not come into this proposition. It is wholly incompetent and irrelevant.

The COURT: I will permit the answer to this question as to whether or not he knows.

A. It is a tie rate, is all I know.

Q. What different class of rates are applicable to different kinds of things?

A. I don't know how many different rates there are, but I know there is a difference—there are different rates.

Q. What is the lumber rate, for instance; what is it called?

A. It is called lumber rate.

Q. How is it classed, what kind of rate, what class rate?

A. Classed so much a hundred, by weight.

Q. From your experience as a shipper of ties and from—do you—are you a manufacturer of ties?

A. Yes, sir.

202 Q. What is your opinion as to whether or not railroad class ties are lumber?

Mr. RODGERS: We object, on the same ground.

The COURT: I overrule the objection.

Mr. RODGERS: We except.

The COURT: I think he has qualified himself to speak. You can have your exception.

A. I never saw them regarded that in my life.

Q. Never saw them regarded as lumber?

A. No, sir.

Q. What is the distinguishing characteristic?

A. Ties are made by the piece; and all the railroads we sell them to has an inspector to see that they are the right size, they must be made the same size—the same size and quality; they have an inspector to pass upon them; they must not be less than 6x8 to be a standard tie, but they can be over that; they can be wider, and can be a little narrower, that is left to the judgment of these inspectors to say; in sawed ties, they are sawed to the line and practically—the saw-mill ain't supposed to judge the character of their size in making—

Q. Is a tie finished or an unfinished product?

A. Finished.

Q. What is necessary to do to it before it can be used for the purpose for which it is intended?

A. Nothing at all.

Q. How about lumber, ordinarily?

A. Well, lumber, of course, has to be manufactured, cut up and formed to be put into something.

Q. Is there any difference in the way ties and other lumber are sold?

A. Lumber is always sold by the thousand feet and ties are sold by the stick, purchased by the stick, sold by the stick, made by the stick: by the piece.

Q. In the shipment of ties, Mr. Signor, is there any difference in the wear and tear of the rolling stock?

A. Yes.

203 Mr. RODGERS: We object.

The COURT: I sustain the objection.

Mr. GLASS: We except, and state that we expect to show that there was a difference.

Mr. MCCORMICK: Mr. Signor, have you had occasion to examine the ties made along the Texas and Pacific right-of-way by the American Tie and Timber Company during the fall and winter—the latter part of 1907 and 1908?

A. I seen some of them, I didn't see all of them.

Q. How many yeards [yards] did you look at?

A. I seen them at Robeline, Chopin and Derry.

Q. Do you know the way they were piled and the condition and kind of ties they were?

A. I didn't examine them very much, no more than I would any other ties that didn't belong to me, to see how they looked.

Q. Was your examination sufficient to determine what per cent. was first-class, second-class, etc.?

A. Yes: I think they were—those at Derry, especially was pretty rough lot of ties, probably would run about twenty-five per cent. culls, and at Robeline was a pretty hard lot of ties, they would not cull over five or six per cent. Chopin was bad. I think about twenty per cent. culls.

Q. Twenty per cent. culls?

A. Yes; on account of timber, workmanship, etc.

Q. Those were the only three places you examined them?

A. Those are the only three places I examined them, I just happened to be there on the Texas and Pacific.

Q. Mr. Signor, what is a standard tie, not below specifications for number one, what is its weight, green?

A. 176 pounds.

Q. That is exactly as to specifications?

A. Yes; exactly.

Q. 176?

A. Yes, sir.

Q. What is its weight when thoroughly dried out?

A. The lightest lot of ties I ever shipped—I shipped 100
204 thousand to the Union Pacific, to the north part of Missouri, some years ago, that were very dry and they averaged 156 pounds and a fraction, the 100,000.

Q. That is the lightest you ever shipped?

A. Yes, sir.

Q. What will the average standard tie, very good quality dried out, weigh?

A. They run about 160 to 165 and 166 pounds.

Cross-examined.

By Mr. RODGERS:

Q. How much do they weigh[t] [weigh] green?

A. About 176 pounds; that is if six by eight, full.

Q. That is a standard tie?

A. Yes, sir.

Q. That is what is contracted for?

A. Yes, sir.

Q. Weigh green, 176 pounds?

A. Yes.

Q. Well, dry, 166 to 167?

A. Yes; from 160 to 166, they will run along. I have averaged up a good many hundred thousand, in lots of 50 to 100 thousand to get the weights.

Q. You don't have to pay any attention to the weight of those you turn over to the Texas and Pacific?

A. No, sir.

Q. Only contracts you get outside of the Texas and Pacific?

A. Yes, sir.

Q. The question comes up of how much they weigh?

A. Yes.

Q. The lot you averaged was 156?

A. Yes; some years ago.

Q. Some years ago? You have a contract now with the Texas and Pacific road?

A. Yes, sir.

Q. Had one in 1907?

A. Yes; this is 18 years. This will be.

Q. This is 18 years you have had a tie contract with the Texas and Pacific Railway Company?

A. Yes, sir.

Q. To furnish cross ties?

A. Yes, sir.

Q. This is an exclusive contract, is it not?

205 A. It is, over the most of the road, the lower end there is another contract.

Q. It is with reference to this part of the line, where the American Tie and Timber Company operated?

A. Yes, sir.

Q. Takes in everything except down in the Louisiana end of it?

A. Yes, sir.

Q. Where they use a different kind of tie?
A. They use a nine foot cypress tie.
Q. That contract is for oak ties?
A. It is for oak and cypress, heart pine, heart cypress.
Q. How many ties do you have to furnish a year to the Texas and Pacific?
A. Don't have any certain number, just furnish all they need for their requirements.
Q. How does it run?
A. It will average about 800,000.
Q. 800,000 per year?
A. Yes, sir.
Q. They don't buy ties from anybody else?
A. No, sir; not without I consent or without I fail to furnish them; if I fail to furnish them they have the right to give me thirty days' notice.
Q. You can't sell ties to any other road unless they are willing for you to do so?
A. I can do it but they don't want me to do it, until they get their requirements.
Q. Is it not a fact that under your contract with them you can't sell, take orders for ties without their approval?
A. It use- to be in the contract, but it is [has] been in late years.
Q. How late?
A. The last—I don't think the last two contracts.
Q. When was the last two contracts dated?
A. The last one ran out the first of January.
Q. 1910?
A. Yes, sir.
Q. When did you enter into it?
A. First of January, 1907?
Q. First of January, 1907, and ran to January 1, 1910?
A. Yes; I don't think that is in it now. I would not be positive, I don't think——
Q. That contract don't restrict you—don't make you get their approval from the Texas and Pacific?
206 A. No, sir; but I consider it just the same. I would not sell to anybody else without their permission unless their requirements—I was sure that I had enough for their requirements, first; that is their object in putting that in, so that I would not sell ties from off their road before they got their ties.
Q. What prices were you paying for ties in the territoory along the Texas and Pacific from August, September to October, 1907?
A. I can't tell you.
Q. Don't you know about what you paid for them?
A. Yes; about, I think we were paying about thirty-two to thirty-four cents.
Q. The American Tie and Tumber [Timber] Company went in the same timber, where you were getting some ties, there, at the same time?
A. Yes, sir.

Q. They paid a little more for ties than you were paying?
A. I don't know whether they did or not.
Q. Didn't they buy ties from the men you bought from?
A. We paid more for ties than they did, but that is the general average price; we paid as high as thirty-five cents.
Q. When they got in there you had to pay more for your ties?
A. No, sir; I didn't change my price at all.
Q. You didn't?
A. No, sir; that is one thing I never done, if they wanted to run the price up——
Q. Why didn't you change your price, they were paying more than you?
A. I don't know.
Q. Don't you know that some of your men refused to turn ties over to you and turned them over to them, because they were getting a higher price?
A. No, sir.
Q. They didn't tell you that?
A. No, sir.
Q You didn't raise your price any?
A No, sir; we didn't raise our price any on account of competition; we raise the price along from year to year as we get a little more from the company. When I first started in there I took the first contract at 25 cents, and I only got 24, but ties raised until I got 40 cents.
Q. Ties were cheaper then?
A. Yes; I never paid any attention——
207 Q. The cost of living has increased as far as ties are concerned as well as everything else?
A. The cost of timber and labor, not much difference——
Q. I will ask you if you didn't tell your tie inspector and buyers along the line—your employés that they need not pay any higher price for ties where the American Tie and Timber Company was doing business, because the American Tie and Timber Company would never be able to move their ties except through your men?
A. No, sir.
Q. You didn't?
A. I never told anybody that.
Q. Then, if one of your men stated that, he stated it without your knowledge?
A. Without my knowledge or authority.
Q. You told them the price they could pay for ties down there, didn't you?
A. No, sir.
Q. You didn't?
A. No, sir.
Q. Did you buy all your ties in person?
A. No, sir.
Q. Who did?
A. I had contracts with sub-contractors all along the road from

year to year, men been with me, some of them twenty-five years or thirty years.

Q. When you fixed these contracts with them would they be in writing?

A. Generally, just a letter or they come in and we make a price.

Q. They come in and you make a price that you will give them?

A. Yes; generally, the first of the year—the first of every year, if there is any change made we make it the first of the year.

Q. Didn't you buy any ties in this territory where the American Tie and Tumber [Timber] Company were operating along the line of the Texas and Pacific Railway, you didn't have a contract to bind your company?

A. Well, we probably had—we found out——

Q. Didn't you instruct your men with reference to these ties, that you would not pay any more than the old price, because the American Tie and Timber Company would never move these ties except through Signor——

A. No, sir; I ain't that kind of man.

208 Q. You say you didn't?

A. No, sir; I never done anything of that kind in my life.

Q. If your men stated that, you don't know anything about it?

A. I don't know anything about it, I don't pay any attention. I instructed my men to go along the same as any one else there and not allow them to push the price up on us at all; to pay no attention——

Q. To pay the same old price, pay no attention?

A. Yes; make no difference who was on the road. There are always tie-makers trying to boost the price.

Q. When did you hear that the American Tie and Timber Company were accumulating ties along the line of the Texas and Pacific in Louisiana?

A. I don't recollect; it didn't bother me enough to pay any attention.

Q. They were buying and piling them at the same stations you were shipping from?

A. I think they probably were.

Q. You shipped from Derry, didn't you?

A. I know they did some.

Q. You shipped from Marthaville?

A. Yes.

Q. Provencal?

A. Provencal, I don't know.

Q. S. & G. Spur?

A. We ride on tie trains and take them from all along there, we want to find a side track——

Q. You also had ties at these places?

A. Yes.

Q. As soon as they commenced to accumulate ties you heard of it?

A. I don't know.

Q. Don't you know you did?

A. No; I do not.

Q. Will you say you didn't know of it in September?
A. I don't know.
Q. 1907?
A. I don't know just when they commenced; I knew they were buying ties there.
Q. Will you say in 1907, you didn't know—September you didn't know they were accumulating ties along by the side of yours?
A. I told you I didn't know, that is my answer.
209 Q. Will you say you did not know?
A. No, sir; I would not say anything of the kind.

The COURT: That is an answer.

Mr. RODGERS: Will you kindly state when you did know, to the best of your recollection?

A. I don't know anything about it; I know they were in there buying ties some two or three years ago.
Q It didn't concern you much that they were there?
A. Mighty little.
Q. I will ask you, Mr. Signor, if you didn't complain to the Texas and Pacific Railroad Company, either to Mr. Thorne or Mr. Everman that the American Tie and Timber Company were down there getting out a lot of ties along the line of their road and you had the moving of their ties and wanted to know what about it?
A. No,sir.
Q. Do you say you never communicated that to the Texas and Pacific Railway Company?
A. No, sir; I never did.
Q. Did you say anything to the Shreveport agent about it?
A. I don't recollect ever saying anything to anybody about it.
Q. Will you say you didn't say anything to any agent of the Texas and Pacific Railroad about it?
A. About their getting ties?
Q. Yes; complain of their getting ties, moving ties along the line of the road?
A. No, sir; I don't think I ever did. I don't recollect having said anything to anybody; I never made any complaint, I know that. We had a surplus of ties.
Q. Did you have any other relation to the Texas and Pacific Railway Company, other than tie contractor?
A. No, sir.
Q. In 1907?
A. No, sir; nor any other time.
Q. No other relation to the company than that of tie contractor?
A. No, sir.
Q. Are you furnished with a pass over that road?
A. Yes.
210 Q. An annual?
A. Yes.
Q. Over all its line?
A. I have two; I have an interstate pass and a pass for Louisiana and Arkansas.

Q. An interstate pass and a pass for Louisiana and Arkansas?
A. Yes, sir.
Q. That would be three passes?
A. No, sir; that is one pass, the Louisiana and Arkansas and the interstate pass I can use going out or into Texas, but not locally in Texas.
Q. That is on the question of the—on account of the Texas law?
A. Yes; I can cross Texas and come back again.
Q. You had that in 1907?
A. No, sir; I didn't have it in 1907. I had it last year; the Texas law hadn't taken effect then.
Q. You had a pass over the Texas & Pacific Railroad, then?
A. Yes, sir; all the time.
Q. Is it not a fact that your inspectors, your employés, are furnished with passes over that road to handle your tie business?
A. Yes; except in Texas. They don't have any in Texas.
Q. Not in Texas since the passage of the anti-pass law in 1907?
A. No, sir.
Q. Prior to that did you have?
A. Yes, sir.
Q. You have them in Louisiana, yet?
A. Yes.
Q. Is it not a fact that you are furnished with a book of forms you can write a pass yourself, already for you to hand them to any of your employés?
A. Yes; for the purpose of sending men out on the work.
Q. You are not a stockholder of that company?
A. No, sir.
Q. Not an officer or an official of any kind?
A. No, sir.
Q. Not an employé?
A. Only as a contractor.
Q. You testified about seeing the ties at Derry, Marthaville and what other station?
A. Chopin, I think, sir.
Q. Did you make any examination of these ties?
211 A. I went around and looked at them.
Q. Went through the yard and looked at them?
A. Yes, sir.
Q. The American Tie and Timber Company knew nothing about it?
A. No, sir.
Q. Did they have any representative with you there?
A. No, sir; I was there on other business.
Q. How did you know the ties—you say you saw ties there, how did you know they belonged to them?
A. I didn't really know, only my men said they belonged to them; they were there getting ties on the same yard. I was down there to check up some piling.
Q. You don't know whether these were the American Tie & Timber Company's or not?

A. I can't say, positively, that is what they told me. They had them loaded out afterwards.

Q. Now, after the institution of this suit you made an offer to the American Tie and Timber Company to buy their ties?

A. I don't recollect that I did. I did offer to buy some, I think they asked me to buy some; they had some stacked there at one place, and I gave him the same I was giving any of my sub-contractors at that time.

Q. You offered them—you offered to buy their ties for 35 cents for number one's and fifteen cents for culls to sell to the I. & G. N.?

A. Yes; I think I did.

Q. That was in June, 1908?

A. Yes, sir.

Q. You wrote that letter about it?

A. Yes, sir.

Q. That was the price you offered?

A. I can't say, I—that was a little more than I was paying at the time.

Q. (Hands witness letter.) You wrote that letter?

A. Yes, sir.

Q. They replied to you under date of June 23, 1908?

A. Yes, sir.

Q. Wanted forty and twenty?

A. Yes.

Q. You replied that you couldn't handle them at that price?

212 A. That is all we were getting for them. That is the facts in the case, we would have lost money if we had given that much for them.

Q. Did you have a contract with the I. & G. N. at the time you made this offer?

A. I surely had or I would not have been buying ties for them.

Q. How many ties?

A. I have forgotten how many. I have had contracts all along.

Q. What was the date of the contract?

A. I can't tell without going back to my records; I furnished them 1250 thousand ties last year; I think that contract was for four hundred thousand.

Q. Don't you know that when the I. & G. N. went into the hands of a receiver that the American Tie and Timber Company had a contract with them for 100,000 ties?

A. I don't know whether they did or not.

Q. Don't you know that after the receivership that contract was cancelled?

The defendant objected, because it was immaterial.

The COURT: The examination of this witness has taken a very wide range, I think you have gone sufficiently far to show his attitude as to his bias in the premises.

F. H. SHOUP, a witness for the defendant, being duly sworn, testified as follows:

(By Mr. MCCORMICK.)

Q. Where do you live, Mr. Shoup?
A. My headquarters are at Omaha, Nebraska.
Q. What business are you engaged in?
A. Railroad tie business.
Q. What particular department?
A. Purchasing department.
Q. How long have you been engaged in that kind of business?
A. I have been on the road 24 years.
Q. What railroads have you operated for?
A. I—I don't catch that question?
Q. What roads have you operated for?
213 A. The Union Pacific, D. & R. G., C. & I., the Penn.
Q. Pennsylvania?
A. Yes, sir.
Q. Have you ever been in the lumber business?
A. Not contracting, I have inspected lumber.
Q. And what has been your occupation the majority of the time you have mentioned?
A. Lumber business, that is, the inspecting of supplies, lumber supplies.
Q. Now, how much of the time within the experience you have mentioned have you been working in connection with ties?
—. ——.
Q. Mr. Shoup, you have been a shipper of ties?
A. No, sir; not in the way you speak of, I am only an inspector of ties for the railroad company.
Q. Have you had charge of passing on ties that were to be shipped out at different points?
A. Yes, sir.
Q. In what territory?
A. Well——
Q. What portion of the country? All portions of the country?
A. Yes, sir.
Q. Have you bought ties for anybody?
A. I have through other inspectors.
Q. Have you sold any ties?
A. No, sir.
Q. Have you been a buyer of ties?
A. Yes.
Q. Extensively so or not?
A. Well, you might say in a way extensively, the other way you might say not; I bought quite a number through—they would give me a price the company—that is what I could pay for them, and they would acknowledge the order that I placed with these people in that way.
Q. Have you ever been a buyer or seller of lumber?

A. Well, no, sir.

Q. Have you ever bought lumber?

A. Just that way, with the price they ordered me to pay; the highest price, and if I could do any better for them I did so.

Q. In railroad construction and maintenance, do railroads use lumber and ties both?

A. Yes, sir.

Q. And in procuring material for construction and maintenance have you had occasion to procure both ties and timber?

214 A. I get so much of it I can't say, just that question, on any piece of work, I can't tell you that.

Q. Sir?

A. Not on any piece [of] work, I can't answer that question.

Q. I say in either construction or maintenance have you had occasion to buy both ties and other kinds of timbers?

A. Yes.

Q. And you say you have been in that business about twenty-three years?

A. Yes; twenty-four years.

Q. From your experience in handling and dealing in both these commodities the way you have stated, did you consider ties as lumber?

A No, sir.

Mr. RODGERS: We object.

The COURT: I will permit the question.

Mr. McCORMICK: What is your answer?

A. I said no, sir.

Q. How is lumber bought and sold?

A. By the foot.

Q. How are ties bought?

A. Some ties are bought by the thousand feet and some are bought by the stick?

Q. 6x8x8 how are they bought?

A. All I ever knew of were bought by the piece.

Q. Mr. Shoup, what is the weight of a standard tie when green, exact standard tie?

A. 6x8x8 ought to weigh in the neighborhood of 170, 175 or 178 pounds.

Q. That is when green, when made out of good green solid oak wood?

A. Yes, sir.

Q. What is the weight of a standard tie, correct measurement, when properly dried?

A. I have seen some go as low as 155 and most of them I think don't go that low.

Q. About what would be a good average on first class dimension ties?

215 A. We always figure on 160 pounds.

Q. One other question. Do you have occasion to examine—did you go down to examine any of the ties of the American

Tie and Timber Company located on the Texas and Pacific Railroad?

A. Yes, I was down there.

Q. Where did you go down there, Mr. Shoup?

A. I believe I first—the furtherst south was at Chopin.

Q. How many places did you look at them?

A. Well, I think between Chopin and Marthaville, Mansfield——

Q. How many places approximately?

A. They are put out at—on sidetracks and I spent a little time down there, not very much, probably two or three days.

Q. Can you give an idea about how many places you inspected?

A. No, sir; I cannot.

Q. You were inspecting them at that time for the Union Pacific?

A. Yes, sir.

Q. To apply on the contract with them?

A. Yes, sir.

Q. Were you sent by them there to inspect these ties?

A. Yes, sir.

Q. Did you inspect these ties?

A. Well, I didn't inspect any on the Texas and Pacific.

Q. Why was it you didn't?

A. They were piled in such shape I couldn't satisfy myself as to what was first-class ties and what was not.

Q. What is the ordinary way of piling ties for correct shipment and inspection?

A. That depends altogether on—if they are going off—if they have been inspected they pile them in ricks and cribs. While I went there to inspect these ties principally and mark them what we would take and get cars in the rush, to enable them to ship some of them out, and give them an idea of what I was to get——

Q. How did you find them piled?

A. Too close together, couldn't see them.

Q. What space of ground did they cover, how many would be in a pile?

A. Some were piled—two at the bottom and five or seven at on top, the next rick would be 20 or 40, would be right up against so I couldn't see them at all.

216 Q. How much of the outside of the ties as a whole were exposed to the weather?

A. Generally the top of the ties and parts crosswise in the rick.

Q. Now, was there as many ties up and down in the crib as there was in that part——

A. That depended on the piler, probably down there—probably a little too high and they would start up another.

Q. Where there are numerous piles is it more or less exposed to the elements, and atmosphere and sun, than if they were stacked regularly in well stacked ricks?

A. Well, if scattered regularly along they would not be as much as scattered out.

Q. When stacked along regularly with ends exposed are they in proper position for inspection?

A. If you can get around all sides of them and see all ends of them.

Q. Then they are in proper shape?

A. Yes.

The COURT: What portion of a tie do you have to look at in order to inspect and determine the grade?

A. The whole tie.

Q. The whole tie?

A. Yes.

Q. How is it possible to stack them so as to see the entire tie and still stack them in a pile?

A. You can see all but about sixteen inches, eight inches here and eight inches here (indicating).

Q. They are ricked up so as to be exposed between?

A. Yes, sir.

Q. You can see all save the space which rests upon the width of the tie next to it?

A. Yes, sir.

Q. Piled up like an old rail fence?

A. Yes, in a rick, two one way and two the other.

Q. Makes it open work?

A. Yes, sir.

Mr. MCCORMICK: Did you go to Mansfield?

A. Yes, sir.

Q. Make inspection of ties there?

A. I looked at these.

217 Q. You looked at the ties?

A. Yes.

Q. What was the result of that examination?

A. In my judgment I thought it too small a tie to make—too big a percentage of cul-age to go through. I refused to go through.

Q. What did you do with reference to the ties at Mansfield?

A. I passed them up, I didn't go there.

Q. That is on the Texas and Pacific road?

A. Yes, sir.

Q. Did you accept these ties?

A. No, sir.

Q. Did you make any report about that at all?

A. I did.

Q. What is the nature of your report?

A. I told him the reason—I—Omaha office the reason I didn't go there.

Q. Too small——

A. Yes, couldn't see them right.

Cross-examination.

Q. When you refer to Mansfield, speaking of some ties stacked up, you couldn't examine them, about how many ties were there then?

A. I can't tell you, lots I could see on the road and over on the terminal at Mansfield.

Q. Mansfield is on the K. C. and the T. P. both, both lines run in in there?

A. Yes.

Q. Was these on the Texas and Pacific or Kansas City Southern?

A. It was over on the Texas and Pacific, that is where I understood them to belong, to the Texas and Pacific.

Q. About what per cent of these ties that you inspected were low grade?

A. I have no record of that, I think I would have taken above what the contract called for.

Q. Were they or not a good average lot of ties for that country?

A. Well, I didn't consider them——

Q. You didn't consider it?

A. No, sir; they were light ties; I have inspected ties for filling our specifications—while it didn't fill them——

218 Q. You were inspecting ties for the Union Pacific under this contract?

A. Yes, sir.

Q. You went down there when, Mr. Shoup?

A. The dates I cannot give.

Q. About when?

A. About in—probably the last of October or the beginning of November.

Q. When you went down there about how many ties did they have along the line of the Texas and Pacific?

A. As I stated it was impossible to tell the number. Quite a little rick in there.

Q. The whole line you saw?

A. Oh!

Q. And up and down the road?

A. Quite a number.

Q. I just want to get an idea?

A. I never tried to estimate them or anything of that kind, of course I——

Q. You can tell about how many ties you saw at these different yards, just estimate?

A. I would not like to answer that question.

Q. Would there be as many as ten thousand?

A. I believe they had probably more.

Q. How many ties did you inspect on this trip?

A. On the Texas and Pacific I didn't inspect any of them.

Q. You inspected on the Kansas City Southern?

A. Yes.

Q. Who inspected those on the Texas and Pacific that were shipped through—three cars?

A. From what I learned it was Mr. Avery.

Q. You inspected on the Kansas City Southern?

A. Yes, sir.

Q. You didn't inspect any of these ties?

A. No, sir.
Q. Just sort of went through them?
A. Yes, sir.
Q. Do you know how much timber is in 6 x 8 x 8 tie?
A. How many feet?
Q. Yes?
A. Supposed to be thirty-two feet.
Q. The price of ties is regulated then according to the price of lumber—of their dimension; in other words, the cubic feet are taken into consideration in fixing the price?
219 A. You might say, yes.
Q. You don't know how many ties on the switch at Mansfield?
A. No, sir; quite a number.
Q. You didn't inspect them you say you told them——
A. I told them I would not go through them.

A. F. BARRY, a witness for the defendant, being duly sworn, testified as follows:

(By Mr. MCCORMICK:)

Q. Mr. Barry, please state your full name to the Court and jury.
A. A. F. Barry.
Q. Where do you live, Mr. Barry?
A. Kansas City.
Q. What business are you engaged in?
A. I am doing a little—since I left the Kansas City Southern I am doing a little brokerage business. My principal occupation is a process of preservation of hardwood lumber.
Q. Mr. Barry, have you ever *angaged* [engaged] in the tie business or inspected ties?
A. I have been inspector, yes; lumber and ties; inspector for different railroads.
Q. How many—how long did your experience extend, over what period?
A. I commenced with the B. & M. in Nebraska, in 1876, working on bridges and buildings; I was then appointed superintendent of yards at Ft. Smith and inspected all ties; I work there until 1893 and I was appointed superintendent of the lumber yard of the Santa Fe in 1883-1893. I quit the Santa Fe in 1894 and was appointed material agent of the Mexican Central at Tampico, Mexico, and *staid* [stayed] there until 1898 and came back and went into the lumber brokerage business in Kansas City and then went to work for the Kansas City Southern as tie and timber inspector; also inspector of treated material.
Q. Have you had occasion to buy and sell ties?
A. No, sir.
Q. Have you had occasion to buy any ties?
A. No, sir; I have had no occasion, I have inspected ties.
Q. During the experience you have mentioned had you had occasion to buy or sell lumber?

A. No, sir; I have inspected lumber for railroads, but I
220 have not bought it; I have made orders for the lumber, and have had orders to inspect it and receive it. It was bought by the purchasing agent.

Q. The brokerage business you speak of; of what does that consist?

A. I am handling some car oak and handling some pieces—I have not handled any pine lumber, I don't do very much brokerage business.

Q. You have inspected ties and lumber for a period of many years?

A. I have inspected ties and lumber since 1878, with the intervention of five or six years.

Q. Based on your experience as you have recited here before the jury, do you consider ties as lumber?

Mr. RODGERS: We object.

The COURT: I sustain the objection.

Mr. MCCORMICK: In your opinion is railroad crossties lumber?

The COURT: I sustain objection to this witness on the ground that he has not qualified to speak; I don't think he has qualified himself as an expert on that line.

Mr. MCCORMICK: It is admitted by counsel that Mr. E. H. Signor, who testified on the former trial, is dead, and we wish to introduce the evidence of Mr. Signor as taken on the former trial.

Mr. RODGERS: We object; it is not in the shape of a deposition.

Mr. GLASS: It is in the shape of question and answer taken upon the former trial. Our Supreme Court has decided that it may be——

The COURT: This is a new question to me. (Examines Wigmore on Evidence.) After investigation I overrule the objection.

221 Thereupon the testimony of E. H. Signor taken upon the former trial of this cause was read to the jury as follows:

"E. H. SIGNOR, a witness for the defendant, being duly sworn, testified as follows.

(By Mr. MCCORMICK:)

Q. (Hands witness paper.) Please state your name to the jury?

A. E. H. Signor.

Q. Where do you live, Mr. Signor?

A. I am living at present in Shreveport, Louisiana.

Q. What business are you engaged in?

A. I am employed by the G. W. Signor Tie Company.

Q. What generally is the nature of your duties?

A. I buy ties and sometimes inspect them.

Q. Mr. Signor, have you ever had any experience as a tie inspector?

A. Yes, I was tie inspector on the Missouri Pacific in 1886 and 1887, also on the M. K. & T.

Q. How long?

A. I inspected on the Missouri Pacific about two years, a little over, and on the M. K. & T. at different times. I don't know exactly how long.

Q. How much inspection work have you done since leaving the employ of these companies?

A. I have done considerable at different times.

Q. How recently?

A. I have inspected in the last week or two. I was inspecting ties two weeks ago.

Q. Does the nature of the business you are engaged in keep you familiar with the matters relating to the different classification of timber ties are made of?

A. Yes, sir.

Q. Did you make an inspection of the ties of the American Tie and Timber Company at the request of the Texas and Pacific Railway Company?

A. Yes, sir.

Q. State when that was made?

A. I think I started about the 9th day of May, 1908.

Q. I will read to you the points on the T. & P. in 1908 at which the plaintiff alleges he had placed ties: Marthaville, Powhattan, Whitlock Spur, Caldwell's Spur, Bridges Mill, Derry, Willow Spur, Sodus, Robeline, Provencal, S. & G. Spur, Hayti, Grand Bayou, Mansfield?

222 A. Yes.

Q. How many of these places did you inspect the American Tie and Timber Company's ties?

A. I think all you named, except Bridge's Mill or spur, I thing that should be Thigpen, I think that is the same spur, as to names——

Q. Bridge's Mill and Thigpen Spur are the same?

A. I think so, I don't find any Bridge's Mill.

Q. In plaintiff's petition here it is claimed there were 6623 ties at Marthaville?

A. Yes.

Q. How many did you find there?

A. I have found 6623; I will have to get my glasses, I think that is the number I found there. (Refers to memorandum.) Yes, I found that number there.

Q. Did you inspect these ties?

A. Yes, sir.

Q. Go through them thoroughly?

A. Yes, *they* [the] best I could the way they were piled; these ties were in pretty fair shape at Marthaville.

Q. How many first-class ties did you find?

A. I found 3633 I considered first class.

Q. Now, before going any further, are you familiar with the specifications of the Union Pacific as contained in that contract?

A. I have heard it read and its specifications.

Q. Does that or not state standard specifications? You refer to those specifications?

A. Yes, sir.
Q. You found out of 6623, 3633 you considered first class?
A. Yes, sir.
Q. How many second class?
A. 1376.
Q. Did you divide them into any other class?
A. Yes, I found 421 rejected, what we call "outs"; I found 1213 red oak.
Q. These "throw outs" why were they thrown out?
A. Didn't consider that they would make a cull or a second class.
Q. In what particular were they deficient?
A. Might be rotten, might be split open, too small, might be several things to make them unfit for culls; some rotten, some split, sun checked and split open, some too small.
223 Q. Those classed as culls, 1376, what were your objections that kept them from being first class?
A. There were—I don't know the size——
Q. What kind of workmanship and measurement——
A. It was workmanship and size both.
Q. Why didn't red oak class in that?
A. Red oak is not considered a tie that—in fact, they don't consider them worth very much; they are timber that don't last in the ground; railroad companies don't—they generally cut these out unless they have a special contract for them, they don't take them at all.
Q. Had these ties been inspected by anybody else from anything that you could discover?
A. Yes, some, not all.
Q. What per cent?
A. I can't tell, I didn't pay much attention to that.
Q. How could you tell?
A. By red spots and cross marks.
Q. Whose marks?
A. I was told that it was the Union Pacific.

Mr. ETHERIDGE: We object to what he was told. As they found the man—took the deposition of the man who did the inspecting and have his depos-tion here.
The COURT: This is not the best evidence of what the Union Pacific thought. I sustain the objection.
Mr. MCCORMICK: We except.

Q. At Powhattan they claim there were 3581; coming up to these specifications, what was the number you found there?
A. I found 3250.
Q. 3250?
A. Yes, sir.
Q. What were the number of first-class ties?
A. 2008.
Q. What was the number of second class?
A. 814.
Q. What was the number of any other class?
A. I found 97 rejected—"outs" and 331 red oak.

Q. Whitlock Spur they claim to have had 323?
224 A. I found that many.
Q. How many first class?
A. 160.
Q. How many second class?
A. 60.
Q. How many others?
A. 8 rejected.
Q. Caldwell's Spur, 528?
A. Yes, I found 519 there.
Q. How many first class?
A. 305.
Q. How many second class?
A. 100.
Q. How many of any other class?
A. Nine rejected and 105 red oak.
Q. At Bridge's Mill; Bridges Mill has another name; they claim to have had 433, how many did you find?
A. I haven't got Bridges Mill; I think this is Thigpen Spur. I have got it. I have that.
Q. Bridges Mill, is the same place they call Thigpen Spur now?
A. It is the same place.
Q. How many did you find at that place?
A. I found 689 total.
Q. Is Bridges Mill and Thigpen Spur the same place?
A. Yes, sir.
Q. They claim they had 433 at Bridges Mill and 277 at Thigpen Spur? That makes a total of 710. How many did you find?
A. 689.
Q. How many were first class?
A. 312.
Q. How many second class?
A. 172.
Q. How many of other classes?
A. 21 rejected and 184 red oak.
Q. At Derry the petition says 5948?
A. Yes, sir.
Q. How many did you find?
A. I found 5789.
Q. How many first class?
A. 3562.
Q. How many second class?
A. 1600.
225 Q. How many other classes?
A. 627 rejected.
A. [Q.] Any red oak?
A. I didn't find any red oak there.
Q. Waller's Spur, the petition shows 493?
A. I found 479 there.
A. [Q.] How many first class?
A. 110.

Q. How many second class?
A. 175.
Q. How many other classes?
A. 194 rejected.
Q. Any red oak?
A. No, sir; I found no red oak there.
Q. Sodus. The petition shows 1213, how many did you find?
A. 969.
Q. How many first class?
A. 740.
Q. How many second class?
A. 205 and 24 rejected.
A. [Q.] Any red oak?
A. No, sir.
Q. Robeline, the petition shows 855?
A. I found 870 there.
Q. How many first class?
A. 644.
Q. How many second class?
A. 201.
Q. How many other classes?
A. 25 rejected.
Q. No red oak?
A. No, sir.
Q. At Provencal, the petition shows 1127?
A. Yes, I found that many there.
Q. Firsts?
A. 790.
Q. Seconds?
A. 311.
Q. Other classes?
A 26 rejected.
Q Any red oak?
A. No, sir.
Q. S. & G. Spur, 1467?
A. I found 1406.
226 Q. How many first class?
A. 1181.
Q. How many seconds?
A. 220.
Q. How many other classes?
A. 5 rejected.
Q. Any red oak?
A. No, sir.
Q. Hayti, 1294 claimed?
A. I only found 1019.
Q. How many first class?
A. 326.
Q. How many second?
A. 418.
Q. How many other classes?

A. 275 rejected. I would like to state in this connection that these ties were piled in such shape that it was utterly impossible to give them that character of inspection—I judge from what I saw of the ends and top layer—they might have been better, I judged from what I saw of the ends and top.

Q. That was Hayti?

Q. [A.] Yes, sir.

Q. Grand Bayou?

A. I found 958.

Q. How many first class?

A. 665.

Q. How many seconds?

A. 253 and 40 rejected.

Q. Central Lumber Company switch, Mansfield, 1153 shown?

A. I found none there. Chopin, I have that; I found some there.

Q. You found some there?

A. Yes, sir.

Q. These ties you found at these places and inspected—how long had these ties—what was the age of them, can you tell?

A. No, sir; it was in May. I can't tell when they were placed there, my business didn't——

Q. I asked you do you know how long the ties had been gotten out and what age——

A. I don't know because I was not familiar with that road. I didn't know when they were put out. I don't know how long they had been there.

227 Q. What was their condition at that time as to being dry or green?

A. They were thoroughly dry. They had been there long enough to thoroughly season.

Q. In making your inspection you stated you were governed by the specifications in that contract?

A. Yes, sir.

Q. And those that were classed there as second-class ties there at those different places, what were the reasons why they did not come up to first-class specifications?

A. Various; some would be too small, and some not good workmanship, and size, usually.

Q. What per cent of the ones that were not first class were not so classed on account of cracks and things of that sort?

A. The proportion I thought was, I suppose three or four per cent, not over that.

Q. Could you tell whether these ties had been damaged by the weather since they had been there?

A. Well, the only—I take it that about the only damage sustained was from sun cracks.

Q. Is that a serious damage?

A. It depends on how bad they are cracked, some of these I classed as second class were split open enough so as to damage them from first-class ties, but could be put in as second class.

Q. Those that you rejected, what was the matter with them?

A. Some rotten, some too small, some was not made and some few of them was split too bad—split wide open; a certain class of timber will split bad.

Q. Have you figured up and made an average of what ties at these places fell short of first class? What per cent of them?

A. Yes; I figured, my inspection run about 24 per cent. second class, eight per cent. red oak and about eight per cent rejected.

Q. The total per cent. not classed first class was about 40 per cent?

A. Yes.

Q. That is taken from figures you have got there?

A. Yes; some yards run bad and some didn't. About the worst yard I found was at Derry.

Q. What was the reason?

A. They were just what I called a hard lot of ties, was not made some rotten, some too small and workmanship generally bad.

228 Q. Anything about the timber?

A. Yes; a great many of them were "overcut," they split worse than other kind.

Q. What was that?

A. A species of white oak.

Q. Is it generally accepted by railroad companies as white oak?

A. I don't think it is.

Plaintiff objected. Objection sustained.

Mr. THAD MCCORMICK: I believe you stated that you had been a great many years an inspector?

A. Yes, about forty years.

Q. Now, how do railroad men and contractors generally regard that particular character of white oak as valuable for ties?

A. They regard it as pretty fair timber, don't regard it as worth very much."

Mr. THAD MCCORMICK: All we offer is the direct examination; we will not offer the cross-examination.

Mr. RODGERS: If he does not offer all the testimony of the witness we shall object, and move to strike.

The COURT: It seems to me you are a little captious concerning this witness.

W. J. GRIFFIN, a witness for the defendant, being duly sworn, testified as follows:

(By Mr. MCCORMICK:)

Q. Please state your full name to the Court and jury?

A. W. J. Griffin.

Q. Where do you live?

A. Grand Cane, Louisiana.

Q. What business are you engaged in?

A. I am employed by the Geo. W. Signor Tie Company of Shreveport, as road foreman and inspector.

229 Q. Inspector of ties?

A. Yes.

Q. Mr. Griffin, did you have occasion any time during the year 1907 or 1908, to inspect any of the American Tie and Timber Company's ties placed on the right of way of the Texas and Pacific in Louisiana?

A. Yes, a part of them. That part south of Shreveport. I didn't inspect all the ties south of Shreveport.

Q. What places did you inspect?

A. Sodus, Marthaville, Whitlock Spur, Robeline, Provencal, Powhattan——

Q. What did—do you know what standard specifications of a tie are?

A. Yes, sir; I am very familiar.

Q. You inspected according to these specifications?

A. Yes, sir.

Q. Have you got a memorandum to show?

A. No, sir; I had at one time, I can't produce that memorandum now, can't give you any exact figures.

Q. Can't give exact figures without the memorandum?

A. No, sir.

Q. Do you recollect what percentage of the ties you found at these places were graded as first class?

A. It would merely be an estimate, Mr. McCormick, for there was a good many of these ties piled in such a way that nobody could make an accurate inspection; unless he could see the whole tie he couldn't be accurate. It would merely be an estimate.

Q. Can you give a reasonable approximation?

A. Yes, I could give what at that time was my judgment on the ties.

Q. Before you give us your judgment, how long have you been inspecting ties?

A. I have been employed by the Signor Tie Company two years and a half; that is my first and only experience as an inspector, though I have had considerable experience in the tie business, dealing in them more or less.

Q. Have you ever gotten ties yourself?

A. Yes, sir.

Q. How long been——

A. Practically all my life, since I have been at work, I am now 44.

Q. How long have you been familiar with standard specifications?

230 A. For eighteen years.

Q. How long have you been estimating and sizing up ties in ricks and cribs, for shipment?

A. Well, off and on to a certain extent for 14 years, but until about two years and half ago very limited extent; prior to that time my business was—I was what you call a subcontractor.

Q. From the experience you have recited, at the time you inspected these ties were you familiar enough with the subject to

enable you to make a reasonable approximate estimate as to the number of each class in these piles?

A. Yes, sir.

Q. What, approximately, as near as you can get at it, was the per cent of first class ties that you found?

A. I would say about seventy.

Q. About seventy per cent?

A. Yes, sir.

Q. What was the per cent of second class?

A. Somewhere between twenty and twenty-five.

Q. What other classes do you find?

A. Some red oak and a few pine, and there are some ties would be rejected in all of them; there are some ties that would be rejected in all.

Q. On what ground would they be rejected?

A. On the ground of worthlessness—not even good enough to be second-class tie; a tie that is not worth shipping.

Cross-examined.

(By Mr. RODGERS:)

Q. How many—what per cent did you say were first class?

A. Approximately seventy per cent.

Q. How many second class?

A. Between twenty and twenty-five.

Q. How many red oak?

A. I can't give you the exact figure, I have already stated that it would be impossible, it is really an approximation.

Q. You testified on the former trial in this case?

A. Yes, sir.

Q. I will ask you if this question was not asked you and answered as follows:

"Q. According to the specifications—standard specifications, what per cent. of the ties you inspected did not come up to those specifications?

"A. About 23 per cent under the first class; I think it will
231 figure about 9 per cent; I gave you the figures on white oak, on the class as rejected, and about 11 per cent. of the entire amount as red oak."

A. I suppose so, I had a memorandum at that time I haven't got now.

Q. You thought nine per cent was correct when you testified?

A. I had better information then than I have now.

Q. When did you go down there to inspect these ties?

A. I can't give you the exact date, some time in April or May, 1908, and I was over the territory doing other work; I don't know the exact time; it possibly extended through March, April and May, 1908, being at different points.

Q. You don't pretend to think you inspected all the ties along the Texas and Pacific, did you?

A. No, sir.

Q. At all stations?

A. No, sir; I never saw any ties except what was south of Shreveport.

Q. You were then in the employ of the Signor Tie Company?

A. Yes, sir.

Q. And doing inspecting for them?

A. Yes, sir.

Q. You didn't say anything to the tie company—the American Tie and Timber Company about inspecting their ties?

A. No, sir; I did not.

Q. They had nobody with you when you went there?

A. No, sir.

Q. You went without their knowledge?

A. Yes, I suppose so.

Q. Who sent you down there, Mr. Griffin?

A. The Geo. W. Signor Tie Company.

Q. For what purpose?

A. I never went any trip especially on purpose to check the American Tie and Timber Company's ties, but while employed in other business and at yards where they had ties, I would make an inspection.

Q. That was under the direction of Mr. Signor?

A. Yes, sir; under the direction of the office, not verbally from Mr. Signor, but under the management.

Q. Under instructions from headquarters?

A. Yes, sir..

Q. Were there any other tie contractors down there during
232 this period except Signor and the American Tie and Timber Company?

A. I don't understand what time you mean?

Q. Any other contractors buying ties?

A. Anybody else buying ties besides them?

Q. Yes?

A. Yes.

Q. Who else?

A. National Lumber Company; the International Creosoting and Constructing Company.

Q. Were they buying oak ties?

A. Not that I know of, you said ties.

Q. They were buying pine ties?

A. Yes, sir.

Q. Did you buy any of the ties for the Signor Tie Company, or take up anything of that kind and ship them, that you speak of along the line of the Texas and Pacific road?

A. Did I buy any? No, sir.

Q. Did you inspect—did Signor buy any ties of the American Tie and Timber Company?

A. Yes, but not on my inspection.

Q. Who inspected them?

A. Mr. Cockrell of the Texas and Pacific—partly—yes, you refer

to white oak—I did inspect some red oak ties Mr. Signor bought of him.

Q. Mr. Signor bought some red oak ties?

A. Yes, sir.

Q. On your inspection?

A. Yes, sir.

Q. The others were T. & P. inspection?

A. Yes, sir.

Q. Where were these ties bought on your inspection?

A. Marthaville and Powhattan is all I recollect, right now.

Q. How many did you inspect?

A. I can't give you the figures, it didn't amount to much.

Q. You testified before, you had a memorandum of the number of ties you found at each place?

A. I did have one at one time.

Q. You haven't got it now?

A. No, sir.

Q. Were you down in that territory along in September, November and December, 1907?

A. Yes, sir.

233 Q. Working for the Signor Tie Company?

A. Yes, I begun working for the Signor Tie Company in October, 1907. Previous to that time I was doing business for myself.

A. [Q.] Known as an inspector?

A. Yes.

Q. Inspecting along the line from Shreveport to where?

A. I never—at least if there was any definite limit I didn't understand it. I covered that territory as far as Shreveport to Boyce.

Q. These stations you named, that is the business that carried you along to these places you named?

A. Yes, I was very familiar with that territory between Shreveport and Boyce.

Q. They were getting out ties and shipping right along, the Signor Company?

A. Yes, getting ties all along during that time.

Q. The American Tie and Timber Company didn't ship any?

A. Well, yes; I think they shipped some during that period, I am not familiar with that, I don't know. I know this, at some points where I saw ties, later on I would not see them, for instance at Mansfield; that is the only evidence I have of their shipping.

Q. You don't know how many ties you actually examined? That you thought belonged to the American Tie and Timber Company? How did you find out they belonged to them?

A. I was familiar with their marks; I was governed in my opinion as to whether they were or not by certain marks they put on there.

Q. Were all the ties you inspected marked?

A. Yes, sir.

Mr. GLASS: The testimony appears in the record here—Mr. Rodgers asked you about this question:

"According to specifications—standard specifications what per cent of the ties you inspected did not come up to those specifications?"

Here is your answer:

"About 23 per cent. under the first class; I think it will figure about nine per cent; I gave you the figures on white oak, on the class as rejected, and about 11 per cent of the entire amount as red oak."

Q. What did you mean by "23 per cent under the first
234 class; I think it will figure about nine per cent."

A. Undoubtedly meant 9 per cent red oak; I had at that time—I am sorry I haven't got it now, I had a memorandum I figured this per cent from; I haven't got this memorandum now.

Q. You think now——

A. This statement I made now is the best of my recollection.

Q. Do you still think 23 per cent would not come up to first class?

A. Yes, that was undoubtedly correct, figured from the memorandum I had.

W. J. SMALL, a witness for the defendant, being duly sworn, testified as follows:

(By Mr. McCORMICK):

Q. Please state your full name to the jury?

A. W. J. Small.

Q. Where do you live now, Mr. Small?

A. Houston.

Q. Houston, Texas.

A. Yes, sir.

Q. In the fall of 1907, where were you and what business were you engaged in then?

A. Agent Marthaville for the Texas & Pacific Railroad.

Q. Did you during that time have application made to you by the American Tie and Timber Company for rates?

A. How is that?

Q. Did you during the time you were agent at Marthaville have an application made to you for either rates or cars in connection with a shipment of ties?

A. Yes, I did.

Q. Who applied and what did they apply for?

A. Just applied for, I believe for five cars to be shipped to Linwood, Kansas.

Q. What did you do about the matter?

A. I first told Mr. Petty I didn't think I could give a rate on oak ties at all.

Q. Who was Mr. Petty?

A. He was Mr. Dan Petty, D. G. Petty & Son.

Q. Was he representing the tie company?

A. He was down there at the time and asked me.

Q. Handling other business; did you ever quote him any
235 rate on ties?

A. No, sir.

Q. Did any cars move out of Marthaville?
A. No, sir.
Q. Any cars sent there to load?
A. Four cars for loading.
Q. And how did it happen they were not shipped out?
A. Didn't have any rate.
Q. Did you advise him to that effect?
A. Yes, sir.
Q. What was finally done with these ties?
A. T. and P. railroad finally bought them.
Q. Do you know what they paid for them?
A. No, sir.
Q. Don't know what they paid?
A. No, sir.

Cross-examination.

(By Mr. RODGERS:)

Q. What business are you engaged in now?
A. Clerk for the I. & G. N. car department.
Q. Clerk for the I. & G. N.?
A. Yes, sir.
Q. What department, car department?
A. Yes, sir.
Q. How long have you been away from the Texas and Pacific?
A. Since January 5.
Q. How long were you agent at Marthaville?
A. Six years—a little over six years.
Q. Did you leave there in January, when did you say you went to the I. & G. N.?
A. Left there in January, 1910.
Q. Six years, you were there from 1904 on?
A. Yes, I went there in 1902.
Q. As agent?
A. Yes, sir.
Q. From 1902 to 1910?
A. Yes, sir.
Q. How long have you been in the railroad business?
A. About 11 years.
Q. You got orders for these four cars and they were loaded you say?
A. Yes.
236 Q. Why were they not shipped out?
A. Didn't have any rate.
Q. How did you happen to find out you had no rate?
A. Well, I knew all the time [1] didn't have any rate. I loaded them on the ground that their company would—wanted it loaded regardless of the rate.
Q. Did you get any instructions not to move these cars, not to bill them?

A. I got—the superintendent asked me on what rate I was going to bill them?

Q. Didn't the superintendent give you positive instructions to issue no bill of lading for oak crossties?

A. Yes.

Q. That is why you didn't bill these four cars out that were loaded?

A. Yes, sir.

Q. You had this lumber tariff 8500-H, didn't you?

A. Yes.

Q. When you placed these cars?

A. Yes, sir.

Q. The request for cars was made by the American Tie and Timber Company as agent at Marthaville you put that request in to the proper department, did you not?

A. Yes, sir.

Q. They set the cars there?

A. Yes, sir.

Q. You knew they were for loading ties?

A. Yes, sir.

Q. They were to be shipped to Linwood, Kansas?

A. Yes, sir.

Q. Now, did you say anything to them at that time about the rate?

A. The rate was brought up about ties and I told them there was no rate and they said they shipped them from Mansfield and Chopin on a twenty-four cent rate and I told them I didn't have anything I thought would cover it, didn't have anything at all to cover it.

Q. You had Joint Tariff 8500-H, didn't you?

A. Yes.

Q. In your office?

—. ——.

Q. You looked that up?

A. It didn't say anything about ties?

Q. Exhibited this to shippers?

237 A. Yes.

Q. Now, is it not a fact that at that time your construction of that tariff was that ties could move under the wording of 8500-H and but for the instructions you got from your superintendent you would have moved them and accepted them as—was not that your construction of that very tariff?

A. Well, I can't really answer that question. I loaded the cars more on advice than anything else; they thought they would be taken on any rate, whatever would come up—that they belonged to the Union Pacific Railroad and I loaded them that way.

Q. You wrote a letter to the American Tie & Timber Company dated November 28, 1907, with reference to these four cars—November 26?

A. Yes, I think so.

Q. This is the letter you wrote. (Hands witness letter.)

A. Yes.

Q. Is that your signature?
A. Yes.
Q. You were agent there?
A. Yes, sir.
Q. Mr. Small, who has talked with you—you were here the last time this case was tried, were you not? In attendance upon the Court?
A. Yes, sir.
Q. You did not testify?
A. No, sir.
Q. That letter was introduced then?
A. Yes, I think so.
Q. You were here during that trial and didn't testify?
A. Yes, sir.
Q. Who has talked to you since the last trial with reference to your testimony?
A. No one at all.
Q. How did you happen to come here from Houston?
A. I was agent for the Texas and Pacific.
Q. Who made the request?
A. My request was—came from headquarters at Houston, I don't know who made the request; the I. & G. N. had me come here.
Q. You got orders from your boss—sent you up here, is that the idea?
A. Yes, sir.
Q. You came?
238 A. Yes, sir.
Q. Well, I will ask you to state whether—if you didn't tell the American Tie and Timber Company in person, in addition to this letter, that that lumber rate applied to crossties and no reason why they couldn't be shipped except your instructions that you got from the superintendent at Marshall, Mr. Andrews?
A. I don't remember it. I remember there was something about it. It seems that they thought the tariff should apply on oak ties the same as it did on pine ties.
Q. It seems since this suit was started you don't think so then?
A. I have been of that opinion all the time.
Q. Your construction of the tariff was different then to what it is now?
A. No; no, sir.
Q. Now, Mr. Marshall, have you got an application in for a position as auditor on the Texas & Pacific pending now?
A. Yes, sir.

Mr. McCORMICK: You understand, Mr. Small, that you came here at the request of the Texas and Pacific as a witness?

A. Yes, sir.

P. H. HEARNE, a witness for the defendant, being duly sworn, testified as follows:

(By Mr. McCormick:)

Q. Please state you full name to the Court and jury?
A. P. H. Hearne.
Q. Where do you live, Mr. Hearne?
A. Bagwell's, Texas.
Q. In the fall of 1907, where did you live then and what were you doing?
A. I was agent of the Texas and Pacific at Fouke, Arkansas.
Q. At Bagwell's, Texas, what is your position there?
A. Same position, agent and telegraph operator.
Q. That is a point in Texas?
A. Yes.
Q. Mr. Hearne, did you bill out any ties from Fouke, Arkansas, at any time during the fall of 1907?
A. I billed out some four or five cars, I don't remember just how many.
239 Q. Which direction were they—what destination?
A. Destined to Colorado City, part of them and to towns in Colorado.
Q. Colorado City, that is in what state?
A. Colorado.
Q. Colorado City, Colorado?
A. Yes, sir.
Q. What route did the way bills give these cars? Which way were they moved?
A. I billed them locally to Fort Worth.
Q. You billed locally to Forth Worth?
A. Yes, sir.
Q. What rate did you use?
A. I used my lumber tariff rate, was all I could find and I taken that for granted that that would cover it, assuming that the agent at Forth Worth would refuse my billing if it was not correct.
Q. Do you remember what rate you applied to this shipment?
A. I think 18 cents per hundred pounds, I am not positive.
Q. What lumber rate was that, by whom was it gotten out?
A. It was according to our lumber tariff applying between Fouke and Fort Worth.
Q. After you had billed out these cars did you have any correspondence with any of your superiors about the matter?
A. Yes, sir; Mr. Sargent, as soon as he discovered I had billed them wrote me regarding them and also the superintendent.

Mr. Rodgers: I object; he states "as soon as he discovered it." That is a conclusion.
The Court: That is a conclusion.

Mr. McCormick: Did you thereafter have any correspondence with Mr. Sargent?
A. I think there were two letters, possibly three, written, regarding it.
Q. Passed between you and Mr. Sargent?

A. Yes, sir.

Q. I will ask you if you received that letter from Mr. Sar-
240 gent? If this is a copy of the letter you received from Mr. Sargent?

A. Yes, I believe that is one letter I received from him. Not the first one, though.

Q. You say this is not the first one?

A. No, sir.

Mr. McCORMICK: We offer this letter that he received.

Q. Did you reply to Mr. Sargent—to this letter—about this matter?

A. Yes, sir.

Q. Is that the letter you wrote about it?

A. Yes, sir; that is the letter.

Q. This is the letter you wrote?

A. Yes, sir.

Q. Have you seen that letter before? Is that a copy of any letter you received from him about it?

A. Yes, that is the letter I received.

Mr. McCORMICK: These letters have both been identified by Mr. Sargent and this witness, we offer them.

Mr. RODGERS: We object, because they are incompetent and self-serving, ex parte; we cannot be bound by it.

The COURT: I think the objection well taken.

Mr. McCORMICK: What did Mr. Sargent tell you about making shipments of this kind?

Mr. RODGERS: We object.

The COURT: If he could testify to that the letters would be admissible. I permitted the witness to say whether he—testify whether he billed these cars out—why he billed these cars out, and he was ordered not to bill any more because he had no lumber rate—
241 no tie rate. I think that is perhaps stretching the rule of evidence somewhat to permit that.

Mr. McCORMICK: If the Court please, I don't see how else it can possibly be gotten at; we are charged that by his act we recognized a certain thing as a rate; now his act in that particular is sought to bind us; we can show by actual correspondence that passed between these two men that his superior, or finding out what he was doing, wrote him a letter telling him that he could not do it and telling him why he could not do it and for his [him] to discontinue it.

The COURT: That is all before the jury.

Mr. McCORMICK: I don't think it is. The letters—I don't know—the letters were admitted before.

The COURT: I think I have extended the rule as far as it should be extended.

Mr. McCORMICK: After this correspondence passed between you did you bill out any more cars of lumber?

A. No, sir; I discontinued billing and refused to furnish cars.

Q. Why didn't you bill out any others?

A. On account of the rate, not having a rate.

Q. Not having a rate. Were you at that time familiar with *with* the Texas State Commission rate on lumber?

A. I was quite familiar with the lumber rates, having handled lots of it.

Q. When you say lumber rate, what do you refer to; was there any distinction between the state and interstate rate, those you had in your possession?

A. Yes, I had Arkansas rates and interstate rates also in separate tariffs.

Q. What rates were you using at the time you made shipments to Fort Worth?

A. I was using interstate rates—interstate tariff applying on lumber.

242 Cross-examination.

(By Mr. RODGERS:)

Q. You say you are now at Bagwell's?

A. Yes, sir.

Q. That is a station on the Texas and Pacific?

A. Yes, sir.

Q. On what is called the "T. C." division?

A. Yes, sir.

Q. Who is superintendent of that division?

A. Mr. R. B. Ayers.

Q. Who is superintendent of the part of the road when you lived at Fouke?

A. Mr. R. B. Ayres, it is an extension of the same division.

Q. Fouke is in his division, east of Bagwell's?

A. Yes, sir.

Q. You are working under the same man?

A. Yes, sir.

Q. How long have you been agent?

A. Continuously in the service of the Texas and Pacific ten years?

Q. Been agent all that time?

A. Except one winter.

Q. Well, you are familiar with shipments of lumber?

A. Yes, sir.

Q. Shipped a good deal?

A. Yes.

Q. That is a lumber country?

A. Yes, sir.

Q. You billed these out under the lumber rate?

A. Yes, sir.

Q. On the interstate lumber rate?

A. Yes, sir.

Q. Mr. Hearne, is it not a fact that the first you heard about this—the first instruction you got, first orders you got from anybody about shipping out ties under the lumber rate came to you from Mr. Ayers, Assistant Superintendent at Texarkana?

A. Let me have that question again, please?
Q. This matter of whether or not you should receive ties under the lumber rate—lumber tariff, came first to you from Mr. Ayers?
A. Mr. Ayers wrote me a letter about shipping the ties, I can't say whether it was previous to Mr. Sargent's letter or not.
243 Q. It came from Mr. Ayers to you and then in your letter to Mr. Sargent you stated that Mr. Ayers had taken the matter up with you?
A. Yes, it was previous to Mr. Sargent's letter then.
Q. That is the first instructions you got about whether or not to accept ties, from the operating department, Mr. Ayers?
A. Yes, sir.
Q. You are still with the company?
A. Yes, sir.
Q. Were you here the last term of court?
A. Yes, sir.
Q. You didn't testify?
A. No, sir; I was not called.

Redirect examination:

The COURT: I desire to have you identify that letter and I will consider it from now until Monday.
Mr. GLASS: Did you write that letter?
A. Yes, sir.
Q. That is the letter you wrote to Mr. Sargent?
A. Yes, sir.
Q. Now, Mr. Hearne, what is the date of that letter?
A. October 20, 1907.
Q. Refreshing your memory from that letter, what do you say what tariff were you using, what number of tariff? How is it known?
A. Tariff No. 10121-H.
Q. What else?
A. Under the head of Texas State Traffic, page 3, crossties are mentioned as items taking the lumber rates.
Q. Was that the tariff you were using?
A. No, sir; that is not the tariff I used; I just told you my excuse for using it—I did find them mentioned in one lumber tariff——
Q. While you didn't find any ties mentioned in the tariff you used, you did find them mentioned in one lumber tariff——
—. ——.
Q. While you didn't find any ties mentioned in the tariff you used, you did find them in this ten thousand and something—Texas State Tariff, you also found under the head of lumber, ties?
A. Yes, sir.
244 Q. You took it for granted you could send ties under the lumber rate?
A. Yes, sir.

WILLIAM LINGO, a witness for the defendant, being duly sworn, testified as follows:

(By Mr. McCORMICK:)

Q. State your full name to the jury?
A. W. M. Lingo.
Q. Where do you live?
A. Dallas.
Q. What business are you engaged in?
A. Retail lumber business.
Q. What is the name of your concern?
A. Lingo Lumber Company.
Q. Who are its officers?
A. I am vice president and general manager, Mr. E. H. Lingo, my father, is president.
Q. It is a corporation?
A. Yes, sir.
Q. How long have you been in the lumber business?
A. Been in the business five years about, the first of last November.
Q. Here in the City of Dallas?
—, ——,
Q. How long has your concern been engaged in the lumber business?
A. About twelve or thirteen years.
A. [Q.] At what other points?
A. Denison, Texas, and Durant, Indian Territory, before it became a state.
Q. What was the nature of the lumber business?
A. [Q.] Retail business?
A. Yes.
Q. Mr. Lingo, how is lumber bought and sold?
A. By the thousand feet; that is the way we designate the quantity, that is, in buying; we sell sometimes by the hundred feet, or less.
Q. Do you know what an oak railway crosstie is?
A. I don't know the specification of it.
Q. Do you know the general article, what it is?
A. Yes, I would know what it is if I saw it.
Q. Have you ever handled that article in your business?
A. No, sir.
245 Q. Do you understand from your business that it applies to that business?

Mr. ROGERS: We object to his understanding. He can testify whether he handles it, whether he deals in it; he can't testify to his understanding, whether it applies to his business or not—I mean his line of business.

The COURT: My mind has wandered off; I didn't hear him.

Mr. McCORMICK: I asked him if he knew what a tie was, and he said he knew the article; I then asked if he thought—if he

understands that it was a part of his business—the lumber business, and was it lumber; that is my object in asking the question.

The COURT: I will permit him to answer the question.

Mr. RODGERS: We except.

Mr. MCCORMICK: From your business that you have testified that you are engaged in and you say you know what an oak railway crosstie is, is that a part of your business, do you consider it lumber?

A. I don't consider it a part of my business; I never [never] had any experience with the oak tie business.

Q. Have you ever heard that it was a part of the lumber business?

Mr. RODGERS: We object.

The COURT: I sustain the objection.

Q. From your lumber business, is it, in your opinion a part of it?

A. I don't know if it is or not.

Q. You have——

A. It is not my business.

246 Q. In your opinion, does an oak railroad crosstie come under the designation of lumber?

Mr. RODGERS: We object. He has stated two or three times he don't know.

The WITNESS: In my opinion I would not consider it so.

The COURT: I will permit the answer.

Cross-examination.

(By Mr. RODGERS:)

Q. You only retail lumber yourself, Mr. Lingo?

A. Yes, sir.

Q. Located here in the City of Dallas?

A. Yes, sir.

Q. You haven't handled any crossties?

A. Never have.

Q. Don't know anything about what the specifications of a standard tie are?

A. No, sir.

Q. Do you handle fence posts?

A. Yes, sir.

Q. They are lumber too, aren't they?

A. No, sir; I would not consider them as such.

Q. Don't consider them lumber?

A. No, sir.

Q. Do you consider shingles lumber?

A. In the strict sense used, I would not call it lumber, I would call them in the lumber line?

Q. Handle fence posts?

A. Yes.

Q. What kind?

A. Oak—not oak, I beg your pardon; Boisd'are, mulberry and cedar, some few locust.

Q. Are there any oak ties produced along in this territory?
A. That I cannot say.
Q. Any oak trees?
A. Yes, some hardwood, more or less around here, down in what we call East Fork.
Q. Down in the river bottom?
A. Yes, sir; that is, I don't know that to be a fact any more than information I have had.

247 Q. You handle shingles?
A. Yes, sir.
Q. And fence posts?
A. Yes, sir.
Q. Do you handle one by six boards?
A. Yes, I do.
Q. Handle all size dimension stuff?
A. Yes.
Q. Handle any oak at all?
A. No, sir.
Q. Handle pine?
A. Yes, sir.
Q. Don't handle oak of any kind?
A. No, sir; not here in this yard.
Q. Do you know anything about what they handle in other yards?
A. Yes, in the oak line?
Q. Handle anything you can sell?
A. No, sir.
Q. Anything in the oak line?
A. No, we could sell oak if we had it here in stock, but it takes quite an outlay of money; it is confined here to two or three yards, practically, and when we have to have any we go to these yards and buy it.
Q. You confine yourself to yellow pine and posts?
A. We carry some cypress.
Q. You mostly handle—sell to the local trade, contractors and things of that kind?
A. Yes, sir.
Q. Where do you get most of your lumber for this yard?
A. We get lumber from East Texas.
Q. Handle a good deal of it over the Texas and Pacific road?
A. Yes, quite a little bit. We get all our long leaf pine stuff from Beaumont, South Texas, and some little stuff from Arkansas.
Q. Quite a large shipper over the railroad?
A. Our stuff comes in over the railroads.
Q. These railroads that come from the territory where this stuff is produced, you are quite large shippers over those roads?
A. I don't think so large, considering so much shipped in two years.
Q. Who has been to see you about your testimony?

248 A. Mr. Flippen came out and asked me, I don't know whether Friday afternoon or Saturday morning asked me if I would come Saturday morning and I told him that I

couldn't come very well then, and he said they would probably want me sometime and asked me if I would appear and I told him I would.

Mr. McCORMICK: Your yard is engaged in the general lumber business, handling all kinds and grades used in the building trade?

A. Yes, sir.

J. L. LOGAN, a witness for the plaintiff, being duly sworn, testified as follows:

(By Mr. RODGERS:)

[Q.] What is your name?

A. J. L. Logan.

Q. What is your business?

A. I am in the wholesale lumber business, manufacturing.

Q. How long have you been so engaged?

A. About eight years.

Q. What business were you engaged in prior to that.

A. I was with the Texas and Pacific people—Pacific Express Company just prior to that, traveling auditor having charge of the Texas and Pacific and Fort Worth and Denver.

Q. Have you been in the lumber business, manufacturing and wholesale, about eight years?

A. Yes, sir.

Q. What points have you been shipping to in your business?

A. Well, about 75 per cent. of my business goes from the Texas and Pacific territory into the West.

Q. In what states do you mean?

A. East Texas and Louisiana, some in Arkansas.

Q. What class of stuff do you handle—with reference to the lumber business?

A. Largely railroad material; my business has been largely confined to railroad mining timbers.

Q. Well, do you know whether or not—have you handled any ties from the Texas and Pacific in Louisiana on interstate shipments?

A. Our customers in the West have never used but very few oak ties; in fact, we have never tried to sell many oak ties out there, but the matter was called to my attention about some oak ties I had bought during the years 1906 and 1907 for the Texas and
249 Pacific road that were moved into that territory.

Q. Who did you buy these ties from?

A. D. G. Petty Lumber Company, of Boline, Louisiana.

Q. Was he owner of a mill?

A. Yes, sir.

Q. Was he a manufacturer?

A. He was a manufacturer in that case.

Q. What kind of an arrangement did you have with him at the time you secured these ties?

Defendant objected.

The COURT: I sustain the objection.

Mr. RODGERS: Mr. Logan, did you buy any oak lumber from Mr. Petty, if so, how much during these years?

A. I can't tell, Mr. Rodgers, I have no memorandum with me at all, only I recollect a good deal of our transactions with Mr. Petty and about different shipments we had in a general way, I can give you that, but as to being accurate I can't do it, having no memorandum.

Q. Did you buy as much as a car per month from him?

A. Yes; O yes.

Q. How many cars a month?

A. To give you an idea about our oak transactions he was shipping a great deal of pine for our company right along; the El Paso Southwestern wanted a few oak ties right along——

The COURT: That is enough.

A. Well, I said—I can't hardly explain any other way——

The COURT: We don't want explanations. We want to know whether you bought oak ties?

A. Yes, I bought oak ties from him.

Q. About how many cars did you buy from him during 1906 and 1907?

A. Well, just judging—may be say, an average of three cars a month, may be it didn't run the entire year 1906 and 1907 because I sold out in May—I judge about three cars a month.

250 Q. For about how many months?

A. We'll say a year.

Q. And were they shipped—where were they shipped to?

A. They were shipped through the El Paso gateway.

Q. From what stagion [station] on the Texas and Pacific?

A. Boline, Louisiana.

Q. Upon what rate were they shipped?

A. I can't—they were shipped on tariff rates in existence at that time, I can't recollect all the different rates, they were shipped on what rates were in existence.

Q. Now, did you buy anything else from him?

A. From Petty?

Q. Yes?

A. I bought a great deal of pine from him.

Q. Were these ties shipped on the same rate pine lumber was?

A. Yes, sir.

Q. That you bought from him?

A. Yes, sir.

Q. About how much pine lumber did you handle from his mill per month during that period?

A. I was figuring a short time ago; to my recollection it must have been—it was in the neighborhood of twenty-five or thirty carloads per month.

Q. These ties went to El Paso on the same rate lumber was shipped out on?

A. Yes, sir.

Q. Any pine ties in your shipments?

A. Yes, had pine ties shipped all the time.

Q. What did they go out on, lumber rate?

A. The same rate.

Q. That is an interstate shipment from these points in Louisiana to El Paso, Texas?

A. Yes, sir.

Q. Mr. Logan, you have been in the lumber business as manufacturer, are you, have you manufactured lumber?

A. Yes.

Q. What points?

A. Well, I manufactured at —— on the Texas and Pacific, at Robeline on the Texas and Pacific and built a very large mill at Mansfield on the Texas and Pacific.

Q. Can you state whether or not as a manufacturer and dealer in lumber, ties are lumber?

A. There are so many different articles, Mr. Rodgers, they are classed as lumber, and we call them—there are different
251 things, like for instance, we speak of stringers, yet bill them as lumber; we always speak of everything coming from a saw-mill as lumber, and bill it that way.

Q. Is that the custom?

A. It is my custom.

Q. If it was pine lumber, hewn pine would be lumber?

Mr. GLASS: We object, it is leading.

THE COURT: You may state whether or not.

A. I will say this; they answer the same purpose; they are used for the same thing.

Q. In your opinion are the ties lumber?

Mr. GLASS: The witness answered that he couldn't testify; that he has shipped a great many things taking the lumber rate.

The COURT: I will let the witness answer.

Q. In your opinion are railroad crossties lumber?

A. I would say yes.

Q. You buy them that way and ship them that way?

A. I buy them sometimes by the piece and sometimes by the thousand feet; very often buy them by the thousand feet, the same as you would 2x4.

Q. Thousand feet?

A. Just like you would 2x4; to give you an illustration, on fence posts for instance, I buy them by board measurement; we ship right along—order 60,000 fence posts 4x6; ship lumber out to be used as fence posts.

Q. In the lumber manufacturing business is there any difference why a stick is called lumber by reason that it is a particular length?

A. I never heard of it before in my life.

Q. Is there?

A. I say no.

Cross-examined.

(By Mr. GLASS:)

Q. Where is your residence, where do you live?

252 A. That is mighty hard to say; I live at El Paso, Texarkana, Mansfield, Louisiana and other places.

Q. Have you got a family?

A. Yes, sir.

Q. Where are they?

A. They are in Mansfield right now, just living there, Texarkana and Mansfield.

Q. Mr. Logan, are you financially interested in the American Tie and Timber Company?

A. No, sir.

Q. Are you connected by blood or marriage with any of the parties employed by that company?

A. Absolutely not.

Q. Have you had any particular business dealings with that company?

A. No, sir; I have not had any dealings with them whatever.

Q. You and they are still in the same territory, pretty much the same?

A. I don't know what their particular territory was; if you want to ask me what my territory was, if you know where they were dealing, I can tell you whether we were or not.

Q. Is your brother interested in the American Tie and Timber Company?

A. I don't think so, if he is I don't know it.

Q. You don't know that he is not?

A. I don't know that he is or that he is not; I would think if he was I would know it; I never have known positively, he is interested in a good many companies that I am not in.

Q. Mr. Logan, have you any data, bills of lading or anything of the sort covering these shipments you speak of?

A. No, sir.

Q. Do you know from what point or to what point it would be billed?

A. No, sir; except it would be through the El Paso gateway.

Q. Over the Texas & Pacific?

A. Yes, I get nearly everything off the Texas and Pacific.

Q. Mr. Logan, I asked you—these ties you testified to a while ago from what point and to what point were they shipped?

A. I can't tell you exactly, except they went through to El Paso or West of El Paso; sometimes to the El Paso Southwestern, sometimes Douglas, Arizona, I can't tell you, they would go as far as El Paso.

253 Q. Do you know positively that there was any car that went from any point down in Louisiana beyond El Paso?

A. I would say positively yes, but to what extent in amount stopped at El Paso or west, I could not say; I will say positively both ways.

Q. Do you know whether or not it was billed both ways or billed locally and reshipped?

A. If they were billed to El Paso—I don't know anything about what they did, if billed through, of course, they always go through.

Q. Do you know any of them were billed through?

A. I am positive, some were.

Q. Did you see any of these cars loaded yourself?

A. No, sir.

Q. Do you know whether the cars were loaded exclusively with ties and exclusively with other kinds of lumber or mixed?

A. Always exclusively ties or exclusively lumber.

Q. What kind of cars, open or closed cars?

A. I can't tell.

Q. Do you know who loaded the stuff in the cars, yourself, or was it loaded by Petty Lumber Company?

A. It was loaded by them. We would get the invoices from them and the bill of lading.

Q. So far as you know they were loaded by them? You never saw the cars, yourself?

A. Never.

Q. You never saw the bills of lading?

A. Yes; I have seen the bills of lading at different times along, every one.

Q. How are they designated on the bill of lading, a car of ties or lumber?

A. Sometimes either one way or the other.

Q. Do you know they were?

A. I am pretty positive that you will find that they were billed sometimes lumber and sometimes ties.

Q. Do you recollect a single instance where you know whether they were billed as ties?

A. I can't swear—that is right hard to answer. I only give you my information.

Q. In a general way, buying and selling lumber is by the foot?

A. Yes.

Q. Did you ever know of ordinary lumber in any size, other than fence posts, something of that sort, being sold by the piece?

254 A. Switch ties and railroad cross ties from the saw-mill are nearly always by the thousand.

Q. That is where they are sawn?

A. Yes.

Q. All other lumber not used for ties or bridge stringers or something of that kind, that is all bought by the foot and not by the piece?

A. Nearly all yard stock is bought by the thousand, yes. Nearly everything cut from the saw-mill is cut by the thousand; you understand every saw-mill——

Q. Now, if you will just confine yourself to answering my questions without going into an argument——

A. All right, I am not intending it that way.

Q. You have been engaged also in getting out ties as well as lumber?

A. I have been engaged in—have been interested in a lumber creosoting company, The National Lumber Co. My brother is president of that, and that *it* [is] entirely under his supervision.

Q. Mr. Marshall, is he engaged with that company?

A. The National Lumber Company?

Q. Yes.

A. Yes.

Q. You and Mr. Marshall were also associated formerly with the Pacific Express Company?

A. Yes, sir.

Q. Was he in your employ or how was that? Who was superior?

A. We were—had equal authority; he had charge of the Texarkana territory and I had charge of the Fort Worth territory, both same position.

Q. You both went in the lumber business about the same time?

A. No, sir; I don't think Marshall went in the lumber business for four or five years after I did.

Q. If you were going to get out a large number of ties and were going to collect a gang of men skilled in that business to get them out, would you advertise for lumber men?

A. No; I would advertise for tie men, sure.

Q. If you were going to buy hewn oak ties you would buy them by the piece or by the thousand?

A. It would depend largely on whatever way the fellow wanted them, I would figure either way.

Q. How are they bought as a matter of fact?

255 A. Generally, by the piece.

Q. Almost invariably.

A. Generally, I would figure on it by the piece.

Q. Did you ever know of hewn oak ties to be bought except by the piece?

A. No.

Q. Is there anything except a railroad that a tie could be used for without being redressed?

A. A tie?

Q. Yes; a tie.

A. Yes; I am selling a great many of them off and on for fence posts, cull ties; one railroad company—I have delivered a great many of them, what we call culls, number 2, to be used for fence posts.

Q. What is a number 2?

A. Number 2 is generally a tie that is defective from size rather than from quality of material——

Q. What I mean is, for ties to be used in the manufacture of anything, you see lumber comes in—for instance; if it takes a 6x8x16——

A. Yes; that is quite a common size for lumber.

Q. Cut that in two, you have it in shape for use?

A. Yes.

Q. Are ties or not—would they be of uniform size so you could convert them into lumber?

A. Well, I can give you an illustration of that; we are selling a great many of that kind of material to the mines in Arizona, and they will take these ties and use them in place of square timbers.

Q. They are used for supports?

A. Wherever they use a square timber, I don't know what they are used for.

Q. Couldn't be used where any accuracy in the size is necessary?

A. I would not think so.

Q. They have to be recut?

A. No, sir; where no accuracy—I would not think so.

Q. Where you should use any fence post or anything you used it—where it required accuracy, you couldn't use it without resurfacing it?

A. You understand I am not versed in all the arts and everything, some fellows might find a place to use that I couldn't.

Q. A tie is primarily intended for one certain, specific use?

256 A. As far as I know; yes.

Q. A 6x8x16 piece, usually, is timber cut to an accurate size and might be used for any of the arts where a piece of material that size is used, might it not?

A. I would think so; yes.

Q. This station that you shipped—this Voline——

A. Boline.

Q. That you were shipping ties from, there was no agent there?

A. No, sir.

Q. Just a saw-mill?

A. That's all.

Q. Where did you get your bill of lading?

A. I never got any at all.

Q. Know what the saw-mill got there?

A. They would make it out and send it to some other station. I don't know what station; Boline is about three miles north of Marthaville and about seven miles from Sodus—I presume the Petty Lumber Company—I have seen them sent from both places, I think the majority of them come from Sodus, because that is coming west; generally, get the bill of lading in the route the stuff is moved.

Q. You shipped a great many carload- of pine ties every month?

A. Yes, sir.

Q. About how many carloads of pine ties would you ship per month?

A. From that station?

Q. Yes.

A. Well, I don't mean to say that I shipped so many pine ties from that particular station; the most of it was pine lumber; some pine ties, some switch ties and a great many bridge ties, but our pine ties, generally, went to Texarkana for treatment. I don't remember, for instance——

The COURT: Mr. Logan, apply yourself to the question and answer it, if you can't do so, say so.

Mr. GLASS: The bills of lading that you had for ties that you say you shipped from down in that territory, you don't know whether they were pine ties or oak ties?

A. I will tell you I very seldom ever saw them that

257 went——

The COURT: Say you don't know.

A. I saw them sometimes——

The COURT: You have answered that.

Mr. GLASS: The shipments of oak ties, that was a small part of it?

A. Yes, sir.

Q. Did they have a pine tie rate, do you know that?

A. Yes; well, not to El Paso; no, sir.

Q. You don't know that yourself——

A. No; I say they have no pine tie rate to El Paso.

Q. Did they have an interstate rate?

A. The tariff does not name any pine tie rate to El Paso, Texas.

Q. What schedule were you shipping under? You were shipping under 8500-H, you know Schedule 8500-H?

A. No, sir.

Q. Were you shipping these ties under that tariff or some other tariff?

A. I knew about what the rate was, Mr. Glass, more than I did the tariff number. I don't know anything about tariff numbers.

Q. These mine props you shipped out, did you ship them to El Paso and that country——

A. We shipped both from Louisiana and East Texas.

Q. Out to El Paso and that territory?

A. Yes, sir.

Q. Did you ship them on the same rate you did lumber?

A. There is—within the State of Texas a different rate.

Q. Did you ship on the same rate you did lumber?

A. The stuff from Louisiana, you mean? Yes; exactly the same rate as lumber.

Q. How billed?

A. They billed in that case—I think we always had our own man handle them.

Q. I didn't ask you that, I asked you how they were billed?

A. Billed as "stulls"—s-t-u-l-l-s—stulls; that is a term of our own for them.

Q. Were they covered by the tariff?

A. Stulls?

Q. Yes?

258 A. No, sir; the tariff didn't call for stulls.

Q. Did it call for props, mining props at higher rate?

A. No, sir.

Q. You didn't ship these mine props as lumber?

A. No; never did. Where I had anything to do with the men making the bills——

The COURT: You were only asked if you shipped as lumber.

Q. What rate did you ship them on?

The COURT: He has testified he shipped them on the same rate as lumber.

Mr. RODGERS: Please describe the size of what you call "stulls."

A. A stull is—different mines use them—all the way from six feet up to about ten feet, and again all the way from six inches to about that diameter up, and different companies use different size; it is an old field pine, and usually the skin is peeled off and cut off at the end and we call that a stull.

Q. Don't go through the saw-mill at all?

A. No, sir.

Q. Cut down and used any length wanted, from six feet to ten?

A. About that, some odd lengths; we have some seven feet——

Q. The size would be—just this small pine, by taking the skin off and using in these different lengths?

A. Yes.

Q. They are shipped as lumber——

A. They take the same rate as lumber to El Paso. These are through rates and uniform, especially from Louisiana to El Paso and go through exactly on the same rate.

Q. They were not mentioned in the tariff——

Mr. GLASS: We object; it is leading and suggestive.

The COURT: I sustain the objection, it is leading and suggestive. He said he knew more about the rate than the number of the tariff.

259 Mr. RODGERS: Do you know whether or not when you shipped these stulls you may have used the word stull or in the bill of lading issued to you in the shipment?

A. I don't believe they were. I think the word "mine prop" was used; but I don't think the word stull was. We use the word stull. I don't believe the railroad companies use the word stull; the mining companies use the word stull to define them.

Mr. GLASS: A stull is a mine prop?

A. Yes, sir.

H. L. REDFIELD, a witness for the defendant, being duly sworn, testified as follows:

By Mr. McCORMICK:

Q. Mr. Redfield, state your full name to the Court and jury?

A. H. L. Redfield.

Q. You are assistant general freight agent of the Texas and Pacific?

A. Yes, sir.

Q. Live here in Dallas?

A. Yes, sir.

Q. Have you had any experience in railroad rates making and construction?

A. Yes; quite a good deal.

Q. State what your experience has been to that effect?

A. I came up through the office, chief rate clerk at one time, chief clerk at another time.

Q. How long has your experience covered?

A. About twenty-four years.

Q. Have you had occasion for the Texas and Pacific Railway Company to consider lumber tariffs with reference to what articles apply under it?

A. I have; yes.

Q. Has the Texas and Pacific used your decision in matters of that kind, any?

A. Well, yes; the officials in every department they have used my quotations and constructions of tariffs.

Q. Have you had any experience in the study of articles that go into tariffs you have made up and promulgated?

260 A. I have tried to have; yes.

Q. From your experience in the Texas and Pacific office in the promulgation and construction of tariffs, particularly lumber tariffs, what in your opinion does—does the general lumber tariffs include oak railroad cross ties?

Mr. RODGERS: We object. Whether in his opinion the general lumber tariff includes railroad ties, because that is the very proposition——

The COURT: I have understood that you insisted upon that a great many times. I overrule the objection.

Mr. RODGERS: We except.

The WITNESS: No, sir; I don't understand that railroad ties are considered as lumber in any of our tariffs.

Q. Unless——

A. I don't understand they are considered lumber at all; they sometimes are put in the tariffs by special application, but unless they are they are not so considered in the tariff.

Q. What is the name of the—number of the tariff applicable to lumber during the fall of 1907, from Louisiana and Arkansas points to Linwood, Kansas?

A. Texas and Pacific Number 8500-H.

Q. As originally promulgated, did that tariff either by its own terms or by special lists include railroad oak ties?

Plaintiff objected; the tariff shows for itself.

The COURT: This proceeding is for the purpose of determining whether they do or not. He has given his opinion as to whether or not oak ties are lumber——

Mr. MCCORMICK: I mean did it specifically mention ties anywhere?

Mr. RODGERS: The tariff speaks for itself.

Mr. MCCORMICK: As originally promulgated, did that tariff

261 specifically mention oak cross ties?

A. As originally published, it did not mention cross ties of any kind.

Q. Of any character?

A. No, sir.

Q. When was the first time that ties came into the tariff and what kind were they?

A. According to the record, in Supplement 148, dated Dallas, Texas, August 21, 1906, date effective September 4, 1906; reductions August 28, 1906, on the 4 page.

Q. What is the date [it] became effective?

A. That would be effective—that would be considered a reduction, because there was no rate in before and would be regarded as a reduction and, therefore, it became effective August 28, 1906.

Q. What is the specific addition it makes to the tariff?

A. In the application of rates articles taking lumber rates, add sawed pine and cypress cross ties to list of articles taking lumber rates as shown in the tariff.

Q. Then, it added pine and cypress?

A. Added sawed pine and cypress cross ties.

Q. When did the next addition to the tariff take effect enlarging the kind of ties?

A. The next supplement was No. 169.

Q. When did it become effective?

A. I am giving the Texas and Pacific number, not the I. C. C. numbers, I don't know; in going into the records we carry two series. Supplement 157 to I. C. C. 792, T. & P. Supplement 159 to Lumber Tariff 8500-H; that is effective May 3, 1907.

Q. Now, give its application?

A. Now, this is the date effective of the supplement; it contains a reissue of items, effective March 15, 1907, showing it to be a reissue. To articles taking lumber rates add pine cross ties and cypress cross ties to list of articles taking lumber rates as shown in tariff as amended.

Q. What rate was it?

A. That was a reissued item; that is, it was in a previous supplement. This supplement carries original date effective, March 15, 1907, and was reissued. It dropped the word——

The COURT: At a time anterior to the date of this controversy you were adding as special items to take the lumber rate certain
262 cross ties?

A. Yes; first sawed and then left off "sawed" pine and cypress.

Mr. MCCORMICK: As articles taking the lumber rate?

A. Yes; add to the list.

Q. When was the next enlargement of that list, respecting ties, in respect to ties?

A. Supplement No. 168, to I. C. C. 792 to Lumber Tariff 8500-H, while on page 5——

Q. When does that become effective——

A. Effective October 25, 1907. It shows on its face except as noted in reissue. This item is not a reissue, so that leaves the supplement out. Effective, October 25, 1907.

Q. What application?

A. Application of rates taking pine lumber rates, add gum, cottonwood and willow cross ties to list of articles taking yellow pine lumber rates as shown in tariff as amended.

Q. Give us the next enlargement of the list of articles in respect to cross ties?

A. Next is Supplement 170 to L. C. C. 792, Texas and Pacific Supplement 172, to Lumber Tariff 8500-H, effective February 16, 1908, page 3.

Q. Now, give the application?

A. It is headed, "list of articles taking lumber rates and higher, add the following to list of articles taking lumber rates shown on

page 76 of tariff as amended; wood railroad cross ties all kinds, car loads; there is an exception following that: "Except on cypress railroad cross ties, car loads, to Sugden, Ryan," &c.

The COURT: That is the last?

A. That is the last of that issue.

Mr. McCORMICK: We introduce all this section of the tariff and supplements that have been referred to in the examination and produce these in evidence.

Mr. RODGERS: We would object to anything not certified as being filed.

Mr. McCORMICK: The original one from which he read in
263 which he shows it was on sawn pine and cypress ties is not introduced for the purpose of showing that it was applicable to this rate, because it never was; it was anterior to the time any ties were offered by the American Tie & Timber Company; it is simply introduced to show the history.

The COURT: I understand that; I don't understand it was offered as being the rate in effect which was applicable here, but simply as showing the history of the tariff relating to ties that has been made in the office of the defendant.

Mr. RODGERS: We except to the ruling of the Court.

The COURT: To what?

Mr. RODGERS: The evidence introduced—the supplement has not been certified; they introduce one supplement that does not show from the certificate of the commission that it was ever filed with the commission.

The COURT: I did not know that counsel was addressing me as to the admissibility of a tariff that had not been filed.

Mr. McCORMICK: I was not introducing it as having any effect on the application of the rate in this case, because a filed tariff, certified, would be the best evidence in that respect; it was only as a collateral matter as showing the development of this rate and the history of it. The original tariff showing that it did not have any provision for a rate on ties.

The COURT: Was that filed with the commission?

The WITNESS: Printed on the face of it is a memorandum that it is printed on all "copies to I. C. C., August 21, 1906," which was the custom of the office.

264 The COURT: I will permit its introduction, limiting it to the purpose for which it is introduced; it is not offered for the purpose of providing that a given rate was in effect, but simply as a history with relation to ties; for that limited purpose I will admit it.

Mr. RODGERS: We except.

Mr. GLASS: You heard Mr. Logan's testimony about shipping ties—pine sawn ties and lumber and mining props?

The COURT: I am from this time on going to restrict both sides to one counsel. I will confine the interrogation of the witness to one counsel to each side; that has been my uniform rule. I have relaxed it, but I cannot say that I am happy in doing so. I will permit it

now, in view of the fact that I have just announced it, but hereafter I will confine the interrogation of the witnesses to one attorney for each side.

Mr. GLASS: Are you familiar with the tariffs which this department made?

A. On mining props?

Q. Yes?

A. Well fairly so; I have not them in my possession at this moment, I remember the general terms.

Q. With reference to the amendment of 8500-H or any supplement?

A. No. 8500-H didn't cover that territory.

Q. Was there separate and distinct tariff?

A. That was included in another tariff, according to my recollection.

Q. Was mining props mentioned?

Mr. RODGERS: We object; he says he has not got it here.

The COURT: The tariff would be the best evidence. I sustain the objection.

Mr. GLASS: We will produce it. I thought it would save time.

Cross-examination.

265 (By Mr. RODGERS:)

Q. Where is Douglas, that is referred to by Mr. Logan?

A. Arizona, one Douglas is in Arizona.

Q. 8500-H covers stations in Arizona, you could ship under this?

A. Well, but mining props——

Q. Anything this tariff covers?

A. As long as that tariff was in effect, naming rate—specific rate to Douglas, that would be the only issue to be used. It refers to El Paso, I think that is what he referred to.

Q. You don't see it in a-y tariff that went to Douglas?

A. I didn't understand him to say Douglas.

Defendant rests.

Adjournment until tomorrow at 10:00 o'clock.

D. G. PETTY, a witness for the plaintiff, being duly sworn took the stand.

Mr. GLASS: We have the tariffs objected to yesterday when Mr. Redfield was on the stand, because the tariffs were the best evidence; we would like to have Mr. Redfield take the stand and identify these tariffs.

The COURT: I will permit him to.

H. L. REDFIELD, recalled.

Mr. GLASS: Mr. Redfield you testified yesterday in this case?

A. Yes, sir.

Q. Have you—do you have in effect in the latter part—latter half of 1906 and the first part of 1907, for a period of about twelve months a tariff applying on pine lumber, pine sawed ties, pine ties and mining props and timbers from Louisiana and Arkansas to El Paso, Texas?

A. Yes; as distinguished from points in New Mexico and
266 Arizona as per the issues which I have in my hand; I took from our office records.

Q. Were copies of these filed with the Interstate Commerce Commission?

Mr. RODGERS: We object.

The COURT: These are not certified copies?

Mr. GLASS: No, sir; they have no bearing upon the issues in this case; of course, we could not anticipate getting certified copies: Mr. Logan was allowed to testify without producing copies at all of tariffs, that showed shipments of pine lumber and pine cross ties—sawed pine cross ties and mining props which he had a peculiar name for from points in—Boline, Louisiana, to El Jaso, destined to points in Arizona, Douglas, I remember; the only purpose was to show that we recognized that mining props and ties were pine lumber or in other words, they were lumber and—

The COURT: There no doubt, was the purpose of the testimony.

Mr. GLASS: We want to show that this movement was not under this Schedule 8500-H, but upon this schedule. The question is, did we move them—

The COURT: This is a circumstance tending to show you did not move them; this does not show—

Mr. GLASS: It will be a question for the jury.

The COURT: You may have your exception.

Mr. RODGERS: We except.

267 Mr. GLASS: Both sheets you hold in your hand are tariffs covering the articles you have mentioned?

A. Yes; they are our record copies.

Mr. GLASS: We want to offer just a part of them.

"Effective, October 3. This is a reissue in part of amendment No. 5 to J. B. No. 66-A, 1409 I. C. C. Rates in cents per 100 pounds. Lumber, sawed pine cross ties, saplings, pine poles for mining timber, car loads, minimum weight, 30,000; from points on Texas and Pacific Railway in Louisiana and Arkansas, Alexandria and West, to El Paso, Texas, when destined to points in Arizona and New Mexico, eighteen cents."

Then in Supplement 19, to same I. C. C. number, is effective, June 27, 1907, is rates in cents per one hundred pounds, on pine lumber, pine cross ties and the word "sawed" is omitted "Pine cross ties. Saplings, pine poles for mining timbers, car loads, minimum weight, 30,000 pounds, from points on the Texas and Pacific Railway in Louisiana and Arkansas, Alexandria and West when destined to points in New Mexico and Arizona, 18 cents."

Mr. GLASS: Mr. Redfield, are you familiar with the handling of

pine lumber, pine ties, pine timbers and props from Boline, Louisiana, to El Paso, Texas, as testified to by Mr. Logan?

A. Only the tariff part of it.

Q. Under what tariff did you move them?

A. At the time Mr. Logan testified about yesterday, I understand they would have moved under either one or the other of these tariffs——

Mr. RODGERS: We object. This tariff shows when it went into effect; Mr. Logan's testimony shows the time he made the shipments.

The COURT: That is a conclusion of the witness.

Mr. GLASS: Do you know whether—for whose benefit, if any one, was this tariff—were these tariffs put in effect in 1906 and 1907?

268 A. I can only testify as to my recollection of the circumstances leading up to the publication of these tariffs.

Q. That is what I want.

Mr. RODGERS: That is immaterial who it was put in for and the circumstances leading up to it.

Mr. GLASS: I think the testimony competent and certainly relevant. The testimony of Mr. Logan is that he made these shipments from Boline, Louisiana, to El Paso, the bills called for El Paso when stuff was destined to points in Arizona and New Mexico, but claimed Douglas, Arizona, as to one point; we propose to show and he can testify to it that these were put in for the benefit of Mr. Logan and others similarly situated. Of course, we had no notice of Mr. Logan's testimony in time to produce the way-bills or bills of lading—copies of the bills of lading showing if these were pine ties and props, and this is a circumstance to show that we only had a rate in—that we not only had a rate in under which this commodity could have moved from Boline to El Paso, but that rate was put in for the benefit of Mr. Logan and others similarly situated, and this is a circumstance to show that he was making shipments under that tariff. And again, there is nothing in 8500-H and supplements as I remember it, that provides for a tariff to show the rates on cross ties from points in Louisiana to El Paso when destined to——

The COURT: I will permit him to state as far as he knows of his own knowledge.

Mr. GLASS: State, Mr. Redfield?

A. Mr. Logan and possibly some of his associates, I think, Mr. Logan, himself, stated that—to our office—in fact, I believe he talked to me at the time.

Plaintiff objected.

The Court: I sustained objection to the testimony he was about to give, as bein hearsay.

269 Mr. GLASS: We don't want that, I——

A. About the issuance of these tariffs?

Q. Yes?

A. They were issued in order to take care of any business that was developed over in East Texas and Northern Louisiana and Southern Arkansas, occasioned by the fact that mining timbers could be gotten out and made from small timber that had been left standing in that territory, the large timber having been pretty well sawed out; at different places it was found that this line opened up West of El Paso in which the mining district offered a new business in the way of mining props, mining timbers or stulls as some people call them; this tariff was issued to furnish an outlet for that traffic.

Mr. GLASS: Now, what do you know, if you know anything, about why the change from sawed pine ties to pine ties straight, so as to include hewn ties, do you know——

Mr. RODGERS: We object, as immaterial.

The COURT: I overrule the objection.

A. That was changed from sawed pine ties to pine ties, so that all kinds of pine ties might be shipped, it being understood that hewn pine ties could not be legally accepted and transported under that tariff.

Mr. RODGERS: We object to what "could be legally accepted."

The COURT: I sustain the objection; the jury need not consider that part of the witness' answer wherein he stated, "it being understood hewn pine ties could not be transported under that tariff;" that being incompetent evidence.

Mr. GLASS: Do you know whether or not, Mr. Redfield, when he first commenced shipping pine ties out of Louisiana whether they were sawed or whether they were hewn pine ties, being the
270 first ties—the first shipments before they got any creosoting plant——

A. You mean under this tariff?

Q. No; when first shipment—what kind of ties did he ship? Were the first sawed or hewn?

A. Sawed ties. I must qualify that——

Q. If you don't know, don't state.

A. What I mean is, sawed ties were shipped under this tariff, or I meant to say it would apply.

Q. I was asking you without reference to any tariff at all; what, as a matter of fact, was the first pine ties shipped out?

A. It is my understanding——

The COURT: I think we have gone into that far enough.

Cross-examined:

Mr. RODGERS: These sheets show they apply on lumber, all kinds except walnut, cherry, &c., don't they. Part of this has been marked out. I want you to state what that would be there; that has been perforated for filing. What is that word?

A. That would be "Lumber."

D. G. PETTY, again took the stand for the plaintiff and testified as follows:

(By Mr. RODGERS:)

Q. Give your name?
A. D. G. Petty.
Q. Where do you live, Mr. Petty?
A. Mansfield, Louisiana.
Q. Do you occupy any relation to the American Tie & Timber Company, the plaintiff in this case?
A. I am president of the American Tie & Timber Company.
Q. Who are the stockholders in that company?
A. Myself, D. G. Petty, Jr., and J. J. Marshall.
Q. The company was organized some time in August, 1907?
A. The early part of August, about the 12, I think.
Q. What business have you been engaged in for the past twenty years?
A. Saw-mill business.
271 Q. How long have you been engaged in the saw mill business and where?
A. I have been engaged in the saw-mill business 27 years; been on the line of the Texas and Pacific over twenty years.
Q. In what state?
A. Louisiana.
Q. When did you sever your connection with the saw-mill business?
A. In May, 1907.
Q. Sold out your plant?
A. Yes, sir.
Q. What was the size of your plant, what capacity?
A. From eighty to one hundred cars per month.
Q. Of what?
A. All kinds of lumber and ties.
Q. You were engaged in the manufacture of lumber operating a saw-mill?
A. Yes, sir.
Q. Well, state—what is the product of such saw-mill as you ran, called?
A. Called lumber.

Defendant objected.

Mr. RODGERS: I asked him to state what the product of such mill as he ran was called?

The COURT: I sustain the objection.

Q. Were you engaged in manufacturing anything except lumber?
A. Everything made of logs, all kinds of lumber.
Q. Among men who make it, is there any difference or distinction between other forms of lumber—between railroad cross ties and other forms of lumber?
A. No, sir; it is all counted lumber.

Q. Did you make any ties during the time you were operating there?

A. Thousands of them.

Q. Thousands of them; what kind, what kind of wood?

A. Pine ties, oak ties.

272 Q. What dimensions?

A. Six by eight of pine—six by eight, from six feet up to ten feet. Ties are cut in different lengths.

Q. Did you sell by the thousands or by the stick?

A. By the thousand feet; very few I ever sold by the piece.

Q. I will ask you to state whether or not when sold by the piece, if the cubic contents of lumber is estimated in fixing the price?

A. The price by the piece is fixed by how much is in the stick; yes.

Q. During the year 1906, did you ship any railroad cross ties, and if so, how many?

A. Yes; I shipped a good lot of them, I supposed 100,000 or over.

Q. During the year 1906?

A. Yes, sir.

Q. Did you ship any during 1906?

A. Yes; I was in business there from 1903 to 1907, and shipped cross ties ever since I have been there, and every mill I have had on the Texas and Pacific in Louisiana.

Q. Well, were they—how were they shipped—your mill was on the Texas and Pacific railroad?

A. Yes, sir.

Q. In Louisiana?

A. Yes, sir.

Q. How were they billed, what rate.

Mr. GLASS: We object to this testimony; what occurred prior to June 29, 1906, as being immaterial. The Hepburn Act amended in 1906 prohibited the transportation or participation in the transportation of any commodity that didn't have a tariff and schedule showing the rates charged and service to be performed; now, there is—we make no pretense that prior to that time and at—section six of that act also gave to the Interstate Commerce Commission the right to prescribe the terms and manner of making up the tariffs and schedules; tariffs and schedules are distinct from rates. Now, it is in evidence that in June, 1907, by Tariff Circular 149, the commodity rates were required to be specific and were expressly provided that rates upon one commodity could not be applied upon a kindred or analogous article. What took place prior to that time or what took place by the railroads prior to that time we contend *was* not material.

273 The COURT: While the practice of the railroads with relation to tariffs and their promulgation would be controlled by the law as it is written on the date suggested by counsel, yet there was offered and received for the defendant testimony with relation to the absence of a rate on this character of commodity long prior to the date indicated by counsel and the testimony will

be permitted to go to the jury on that question, as to whether or not it has been the policy of this road never to have a rate on cross ties; not for the purpose of controlling the main issue in this case which is whether or not the defendant had in effect the time the hewn oak ties were offered carriage a rate—tariff incorporating a rate covering oak cross ties within the rules and interpretations made by the Interstate Commerce Commission and the Courts.

Mr. GLASS: We except.

Mr. RODGERS: Mr. Petty, did you up to the time you sold your mill, you shipped ties from your mill situated on the line of the Texas and Pacific in Louisiana?

A. Yes, sir; up to the last day that we were there we shipped ties; we shipped both pine and oak ties.

Q. Both shipped on the lumber rate?

A. Yes.

Q. Billed to interstate points?

A. Yes; that is, El Paso and West. Some of them stopped at El Paso and some billed beyond; that would be interstate, being Louisiana and Texas.

Q. Now, I will ask you, as a matter of fact, if lumber does it make any difference what length of a stick of timber is whether it is lumber or not?

A. None at all.

Q. What lengths did you make?

A. I have shipped lumber from four feet up to forty feet.

Q. Does it make any difference—is there any difference among manufacturers of lumber as to whether there is a particular name on a piece, like flooring or ceiling or anything of that kind, does that segregate it from the other, would you understand that to be lumber?

A. No, sir; there is no difference; it is all lumber. I consider flooring lumber, or stringers lumber, or anything made from a log, caps.

274 Q. Take a car of railroad plates, is that lumber?

A. Yes, sir.

Q. Siding?

A. Yes, sir.

Q. Stulls?

A. Yes, sir.

Q. What do you call caps?

A. They are put on top of piling for the stringers to lay on for the track.

Q. Is that lumber?

A. That is lumber, of course.

Q. You say ties are different lengths?

A. Yes; six feet up to ten feet. So are telegraph poles; they are always billed as lumber, piling.

Q. Now, Mr. Petty, a question was asked here yesterday about how it is—what kind of cars shipped in?

A. Generally in box cars, on account of safety, to keep it from falling off or being stolen.

Q. What do you do—do you ship all kinds of lumber in box cars?
A. Of course, heavy timbers are shipped in flats on account of being easy to load.
Q. Would these cars be closed?
A. Every one of them will be closed; it is a rule of the railroads that unless they are fastened the train crew will not pull them out; we have had cars left on the track, if they were not closed, the train crew will come along and leave them there.
Q. That is a regulation of the company?
A. Yes, sir.
Q. These different shipments to El Paso and places beyond, do you know anything about the Western Weighing and Inspection Association there?
A. Yes, sir; they did have there at that time a weighing and inspection bureau.

Defendant objected.
The COURT: I will permit him to answer yes, if he knows.
Mr. RODGERS: The question of Mr. Glass to Mr. Logan seemed to indicate that the company had no weighing and inspection association. The Western Weighing and Inspection Association
275 is organized and paid by all the railroads at El Paso, and they maintain a weigher and inspector who weighs and inspects all freight that passes through that gateway, and if these cars—if they are not properly billed, not shipped out on proper weight and not properly classified and proper weight applied——
The COURT: Put your question.

Mr. RODGERS: What is the object of that Western Weighing Association? What does it do?

Mr. GLASS: We object.
The COURT: I sustain the objection. I presume it is because the evidence offered is not the best evidence.
Mr. GLASS: That is one objection.

Mr. RODGERS: Do you know whether or not that association, or its representatives, reweigh and inspect all lumber coming through that gateway?
A. I know as well as a person could know.

Mr. GLASS: We object.
The COURT: I will permit him to answer the question if he knows.

Mr. GLASS: He says he knows as well as any person could know.
The WITNESS: I have never seen it.
The COURT: I sustain the objection.

276 Mr. RODGERS: I will ask you to state if you have during the years 1901 to 1907 sold them, or your plants sold railroad ties to other people than to Mr. Logan, who testified yesterday?
A. Yes.
Q. When were they sold and shipped out, where were they shipped to and under what rates?
A. Regular rates, lumber rates, like we ship everything else.

Q. Now, Mr. Petty, you know what a guard rail is, don't you?
A. Yes.
Q. Describe it to the jury?
A. It is generally 6x8 running along the end of the ties, so the ties won't spread.
Q. Used for that purpose exclusively by the railroads?
A. Yes, sir.
Q. It is named and distinguished in railroad supply stuff?
A. Yes, sir.
Q. Is it not considered lumber by mill men who manufacture them?
A. It is lumber.
Q. Take the boards they use at the crossings, dirt crossings, what do you call these?
A. Call them crossing planks, they are generally 3x2x18.
Q. Are they lumber?
A. Lumber, yes, sir.

Cross-examination.

(By Mr. GLASS:)

Q. What ties you shipped were from a sawmill, were sawed ties?
A. Yes, sir; except some located at our mill switch.
Q. I am talking about what you did?
A. Sawed ties.
Q. And you say sawed ties according to your understanding, according to your opinion is lumber?
A. Certainly; yes, sir.
Q. How about ties, a man takes an axe and goes to the woods and hews them, rough, hewn ties?
A. They are ties, railroad cross ties; they are ties too.
Q. Are these hewn ties lumber?
A. Yes, sir.
Q. Suppose he didn't make ties, but made cord wood?
A. I don't know about cord wood; that is not in any shape.
277 Q. Is not cord wood cut?
A. It is in length, but not in shape.
Q. Suppose he goes out and splits it up?
A. If he gets it in shape, I would call it lumber.
Q. If you go to get out cordwood, hire men to get out cordwood, you would expect, if you told them to get out lumber you would know it was cordwood?
Q. How is that?
Q. If you were going to get out cordwood and went and hired men to get out cordwood and advertised for hands to get out cordwood, would you expect them to come along and get out lumber?
A. Certainly I would not.
Q. A tree is not considered lumber?
A. Not unless it is put in some shape; it is if it is put in shape, six by eight——
Q. Suppose it was all split?
A. They would not be in the same shape.

Q. Would you call it lumber?
A. No, I would not.
Q. You spoke about these shipments, did you do your own billing?
A. I had—my clerk; half the time I billed myself.
Q. Who did the sealing up of the car doors?
A. We closed them and the train crew sealed them.
Q. You closed and fastened the hasp?
A. Yes, sir.
Q. The train crew didn't have anything to do but come along and put in the wire?
A. I suppose that is all they did; they sealed them.
Q. They left your mill in that condition?
A. They left my mill just the way I left them; they would take them to the next station, Sodus, I suppose, and sealed them there.
Q. Bill of lading issue at Sodus?
A. Yes, and sent back to me by mail.
Q. Bill of lading always made out by you at the mill?
A. Yes, but the train crew had nothing to do with that.
Q. I didn't ask you that; it was made out at the mill?
A. Yes, sir.
Q. Sent to Sodus and signed by the agent?
A. Yes, sir.

The COURT: You made the way-bill out as lumber?

278 A. Yes, as lumber, as ties, as stringers and sometimes pine ties, sometimes yellow pine ties and sometimes different names.

Q. Why did you make them out pine ties? Why didn't you make them out as lumber?
A. Well, it is more habit than anything else.
Q. Don't you know it is to enable people to know what is in that car?
A. No, sir; I do not.
Q. Do you undertake to say they would know it was loaded with ties if you made it out lumber?
A. Well, I have given as good a reason for it as I know; yes, of course.
Q. In fact, you never did make out a bill of lading for a car of pine ties—pine cross ties and call it pine lumber?
A. No, I don't know that I did.

Mr. RODGERS: Have you shipped a car of flooring and billed it as lumber?
A. Yes.
Q. If you shipped a car of caps?
A. That is shipped as lumber.
Q. Stringers?
A. Sometimes shipped as stringers, sometimes shipped as lumber.

A. L. BURKE, a witness for the plaintiff, being duly sworn, testified as follows:

(By Mr. RODGERS:)

Q. What is your name?
A. A. L. Burke.
Q. What is your business?
A. Ties and lumber business; timber business.
Q. How long have you been engaged in that business?
A. I have been in my present business for myself only a few months.
Q. Tie and timber business generally?
A. At one time and another for twenty years or more.
Q. Have you ever been employed by a railroad, and if so, in what capacity?
A. With the transportation department, construction and maintenance of way department, pretty near all departments.
Q. Are you familiar with the term lumber, and what it means? Among railroad men?
A. Yes, I think so.
279 Q. And also among producers of lumber?
A. Yes, sir.
Q. Are ties included in the word lumber?
A. I think so, that has always been my supposition.
Q. Now, Mr. Burke, with reference—during the year 1907—when did you go with the American Tie and Timber Company?
A. I don't just know; sometime in October.
Q. How long did you remain in their employ?
A. Until some time in March this year.
Q. March of this year?
A. Yes, sir.
Q. What were your duties?
A. When I first went with them I was in the land and timber department more than anything else, looking over some bodies of land on the Texas and Pacific and Kansas City Southern, with a view to——
Q. After these ties were accumulated along the railroad and the railroad refused to ship them, who looked after these ties?
A. I did principally.
Q. Now, Mr. Burke, do you know the number of ties that were in the yards or along the line of the Texas and Pacific railroad from —along in—accumulated on this Union Pacific contract?
A. I do know, because I loaded the ties out.
Q. You loaded them out?
A. Yes, sir.
Q. When you loaded them out, did you take all at each station?
A. Yes.
Q. Have you a memorandum that will show?
A. Yes.
Q. I will ask you how many ties were along the line of the Texas and Pacific, at Fouke, and——

The COURT: Let him give the number—let him state how many cars from each place.

The WITNESS: 11,836.

Q. How many from Chopin, Louisiana?

A. 839.

Q. Marthaville?

A. 8226.

280 Q. Powhatan?

A. 3581.

Q. Whitlock Spur, Louisiana?

A. 2033.

Q. Caldwell's Spur?

A. 1638.

Q. Bridges Mill?

A. Bridges Mill is the same as Thigpen—1420.

Q. Bridges Mill and Thigpen are the same?

A. Yes, called the same name, it has two names.

Q. 1420. Derry, Louisiana?

A. 5948.

Q. Waller's Spur, Louisiana?

A. 493.

Q. Sodus, Louisiana?

A. 1211.

Q. Robeline, Louisiana?

A. 885.

Q. Provencal?

A. 1127.

Q. S. & G. Spur?

A. 1457.

Q. Hayti?

A. 1719.

Q. Grand Bayou?

A. 975.

Q. Central Lumber Company's Switch? Mansfield?

A. Central Lumber Company's Switch, Mansfield, I haven't got. Yes, I have; 1185.

Q. Do you know what became of those at Mansfield, 1185, to whom sold?

A. Yes, sold to the Robeline Lumber Company.

Q. Did you have anything to do with checking up, do you know how they were inspected?

A. I went down and made an inspection of the ties and left them in there and Mr. D. G. Petty seen to the shipping out of the ties.

Q. How many first class, and how many second class?

A. I think I threw out a couple as defective, I can't give the classification.

Q. Mr. Burke, with reference to the ties that were gotten out by the American Tie & Timber Company, were they up to the standard of number one railroad cross ties, standard ties?

281 A. Fully so, because they paid a little better price than other contractors and demanded a little better material.

Q. You are familiar with the woods used by the railroads for standard cross ties and familiar with the size and requirements of the stock; now, you say you went with the American Tie & Timber Company in October, did you—do you know Mr. H. S. Hinton, Commercial Agent of the Texas and Pacific at Shreveport?

A. I know Mr. Hinton by sight, I have seen him in the office once or twice.

Q. I will ask you to state whether or not you were present in Mr. Marshall's office when Mr. Hinton called on him with reference to the lumber rates?

A. I was present.

Q. Can you state whether or not Mr. Marshall read to him—to Mr. Hinton, or let him read that clause in the contract with the Union Pacific Railroad Company with reference to the right to cancel the contract if the rate was raised?

A. I cannot, because I was at work in the adjoining office and I don't know what that conversation was.

Recess until 2:30, Wednesday.

WEDNESDAY, 2:30 p. m.

Mr. BURKE resumed.

Mr. RODGERS: You say you have been engaged in the railroad business; have you been engaged in handling railroad supplies, timbers and lumber?

A. Yes, sir.

Q. During what period of time?

A. About 1898 to 1904.

Q. Now, with reference to the transportation rules, you say you have been in the transportation department, maintenance of way, etc., if you know, is there any rule with reference to whether the door shall be closed before they move the cars?

A. Yes.

Q. What is the rule?

A. The car is not considered loaded until the doors and windows are closed ready to be sealed, if any to be sealed.

Q. What is the size of a box car—an average box car?

282 A. From about eight feet six to thirty-two is the shortest, old cars were 28, I have handled all kinds; I think 26 is the shortest car I ever handled and up to fifty feet.

Q. The width of them?

A. Eight feet; some old cars were narrower, were not quite eight feet; but I think the standard is about eight feet eight inches.

Q. What is the height from floor to roof?

A. About the same, about eight feet and a half.

Cross-examination.

(By Mr. GLASS:)

Q. What railroads have you worked on?

A. Texas and Pacific, Texarkana and Fort Smith, which was the Kansas City Southern, the Gulf and Interstate, Kansas City, Brownsville and Mexico, the Mexican Central, Yellow Stone Park——

Q. Were you an office man or operator, train man?

A. I have been in charge of both departments.

Q. Sir?

A. I have been in charge of both departments, both office and transportation.

Q. Have you been local agent for any of these roads?

A. No, sir.

Q. What position did you hold with any of them?

A. I have held clerical positions, I have been in the position of general agent, terminal agent, and——

Q. General agent to solicit freight?

A. Yes, sir.

Q. Does he make out bills of lading, classify freight?

A. I did not.

Q. Is it not a part of the office of commercial agent to do that kind of work, you didn't promulgate tariffs, file tariffs?

A. No, sir.

Q. Did you get instructions from your general freight agent about the application of tariffs, didn't you, as commercial agent?

A. I never did.

Q. If you wanted to find out the rate on something, the commercial agent wanted to find out, how would you get it?

A. From the tariff.

Q. If there come up a construction of tariff, then whose advice did you get on it?

A. Personally I never did that, never had to appeal to—never had it come up.

283 Q. How long since you worked for a railroad company?

A. About three years, approximately three years.

Q. Have you worked for any railroad company subsequent to January 1, 1906?

A. Yes.

Q. What company and at what place?

A. Mexican Central at Monterey, Mexico, and Yellow Stone Park in Montana.

Q. What years did you work for them?

A. Both 95 and -6, Yellowstone Park—1906. I didn't mean 1896.

Q. What part of the year was it you quit railroading?

A. Sometime in September, I think.

Q. Had you had occasion prior to leaving the railroad company to construe tariffs with reference to the new provisions of the Interstate Commerce law enacted that year?

A. I did not.

Q. You did not?

A. No, I did not.

Q. Did you ever buy or sell any lumber?

A. Yes.

Q. Both bought and sold?
A. Yes, sir.
Q. Did you ever invoice lumber as ties or ties as lumber?
A. Yes.
Q. To whom did you invoice any ties as lumber?
A. I am at the present time invoicing ties to the National Lumber and Creosoting Company at so much per thousand, which the contract calls for.
Q. What do you call them in your invoice? What is the word you write down in your invoice to describe the ties?
A. Seven by eight by nine, so many feet; whatever these figures are.
Q. Is it not a fact that on every invoice you write "cross ties?"
A. No.
Q. When they order these sticks from you what do they call them?
A. I am shipping stuff now they specifically specify the Rock Island specifies that the ties are to be paid for per thousand feet board measurement and that is the way I invoice them.
Q. When they order from you what do they call them?
A. They want switch ties.
284 Q. Switch ties. Railroad switch ties; a switch tie is longer than an ordinary tie, is it not?
A. Some of them are and some are not.
Q. An ordinary tie is eight feet?
A. An ordinary tie is.
Q. A switch tie is nine feet or longer?
A. A switch tie is eight feet, one can go up as high as 16 feet and some of them go as high as 17 feet and I have seen some 19 1/2.
Q. They don't creosote oak ties?
A. Yes.
Q. Creosote oak ties?
A. Yes.
Q. Are you shipping any oak ties to be creosoted?
A. Yes.
Q. Hewn oak ties?
A. Yes.
Q. You just simply describe them as lumber?
A. Yes.
Q. Just been doing that since the institution of this suit or did you always do it?
A. I was out of business for myself a good long time, in fact I was out of the United States a good long while and many things come up when a man is out of business and when I came back I didn't know of, I didn't know——
Q. Is it not a fact that you never did class ties as anything but ties until after this suit came up?
A. No.
Q. When did you ever do it before this?
A. As superintendent of construction up on the Kansas City, Mexico and Orient railroad we had a rate in there, when we had

the privilege of making rates, that I could ship some rails, bridge timber, building material, and any kind of material in the world, no matter what kind——

Q. Where was that?

A. Anthony, Kansas, was my headquarters most of the time.

Q. Was not that a rate on railroad construction material?

A. Yes, sir.

Q. Is it not a fact that every one of these things you mentioned was specifically mentioned in that tariff?

A. No, sir. Not one of them was mentioned.

Q. What year was that?

A. 1903, I think 1902 to 1904, to be specific I will say 1903, sure.

285 Q. As a matter of fact, all that stuff you were shipping was construction material?

A. It was.

Q. And shipped as construction material?

A. No, we got spikes and steel rails and bridge timbers and piling, and ties and everything that come in here no matter what specified, we shipped at the same rate.

Q. Shipped for the purpose of railroad construction?

A. Yes, sir.

Q. Was not shipped as lumber for commercial sale and used in building?

A. Yes, I have used it—no, not for commercial sale.

Q. You say they shipped steel rails and lumber under the same class?

A. Yes.

Q. Did you ever examine the tariff on file in relation to that stuff?

A. I had no occasion to, but I paid the freight—I. O. K.'d the freight bills and if not correct I didn't O. K. them.

Q. You know they took the same amount in cents per hundred pounds?

A. Cents per ton per mile, I didn't figure out the mileage to O. K. it.

Q. You knew the rate, but didn't see the tariff?

A. Yes, that is true, I didn't figure out the mileage to O. K. it.

Q. You knew the rate, but didn't see the tariff?

A. Yes, that is true; I didn't see the tariff.

Q. You knew the rate, but never say the tariff; you don't know whether specifically mentioned or not in the tariff?

A. Nothing specifically mentioned in the tariff.

Q. You say you didn't see the tariff; you simply knew what the rate was, how can you testify whether they were specifically mentioned in that tariff, or not?

A. I know when I looked in the tariff it was not in there.

Q. Didn't you say you didn't see the tariff?

A. I didn't look at the tariff for this special purpose, because there was not anything mentioned in there in regard to——

Q. Where did you see the tariff?

A. Kansas City and Anthony and in our office here.
Q. What did the tariff cover, what did it say?
A. It generally covered construction materal.
Q. What did it cover, what was the general nature of the tariff, what did it purport to cover?
286 A. Taking lumber ta*ff*, lumber tariff and higher rate.
Q. Was it denominated lumber tariff?
A. No, all kinds of tariff, lumber tariff and higher.
Q. What general term was applied to the tariff on the face of the tariff?
A. I would not attempt to specify.
A. [Q.] You don't recall that?
A. No.
Q. Do you recall what it purported to cover?
A. It didn't purport to cover anything; I was shipping and was receiving under this tariff.
The COURT: When you were shipping under it, it was at a time they had the privilege—before there was a low——
A. Yes, ship on any rate they wanted to previous to that time.
Q. In other words, prior to the Interstate Commerce Act of 1906, you understood they could apply this rate or that rate to certain commodities and didn't get into trouble as they do now? Is that it?
A. That was, I am not talking now about 1906, I am talking about 1903, I am talking about the time I was shipping and receiving that stuff.
Q. You knew at that time as a traffic man that there was no——
A. I didn't say I was a traffic man.
Q. You were commercial agent for some railroad, and you were constructing tariffs, you didn't feel like you needed any assistance or help, you did it, don't that constitute a rate man?
A. No, sir.
Q. You considered yourself a rate man?
A. The office boy should be able to construe it after it was written out.
Q. No trouble about construing rates?
A. No.

Plaintiff introduced in evidence a portion of section 12 of Tariff Circular 14-A promulgated by order of the Interstate Commerce Commission, June 3, 1907, commencing on page 12, which reads as follows:

"The law affirmatively imposes upon each carrier the duty of filing with the Commission all of its tariffs and amendments thereto, as prescribed in the law or in any rule relative thereto which
287 may be announced by the Commission, under penalty of failure so to do, or for using any rate which is not contained in its lawfully published and filed tariffs. The Commission will give such consistent assistance as it can in this respect, but the fact that receipt of a tariff or supplement to a tariff, is acknowledged by the Commission, or the fact that a tariff, or supplement to a tariff, is in the files of the Commission will not serve or operate to excuse the

carrier from responsibility or liability for any violation of the law, or of any ruling lawfully made thereunder, which may have occurred in connection with the construction or filing of such tariff or supplement."

Mr. RODGERS: We want to introduce some portions of Circular 15-A, superseding 14-A, promulgated February 3, 1908.

Mr. GLASS: That would be immaterial; any rule promulgated by the Interstate Commerce Commission since 1908.

The COURT: Since this controversy arose?

Mr. GLASS: Yes.

The COURT: It is not admissible as evidence on any theory of this case that I can see; it may be an answer to some contention made by the defendant here as to what the Commission had or had not sanctioned, but as evidence I do not see that it is admissible; go ahead and read it, I don't see that it is material.

(Plaintiff read extracts from Circular 15-A, promulgated by the Interstate Commerce Commission February 3, 1908).

Freight Tariffs and Classification.

"Tariffs that were lawfully on file with the Commission on May 1, 1907, and that have not since that time been superseded or cancelled, will be considered as continued in force, and until they can be properly reissued may be amended without complying with the requirements of these rules as to the number and volume of supplements, and as to showing concurrence forms and num-
288 bers. All tariffs issued or reissued later than May 1, 1907, must conform to all of these rules. The Commission may direct the reissue of any tariff at any time. A tariff publication as to which these regulations have not been conformed to is subject to rejection by the Commission when tendered for filing.

"The term "joint rate," as used herein, is construed to mean a rate that extends over the lines of two or more carriers and that is made by agreement between such carriers.

"Joint tariffs" are those which contain or are made up from such "joint rates."

Mr. RODGERS: We identified when Mr. Signor was on the stand some correspondence between him and the American Tie and Timber Company with reference to these ties and the price he offered; we will offer the letters.

Mr. GLASS: We object; they are immaterial; it is immaterial what correspondence took place between the American Tie and Timber Company and Mr. Signor.

Mr. RODGERS: It is on this theory. That we were using our best endeavors to obtain the best possible price for these ties.

The COURT: That is uncontroverted.

Mr. RODGERS: Well, that is all right.

Mr. RODGERS: We offer the following cross-examination of Mr. Eli Signor, taken on the former trial, on page 262 of the original record:

"Q. Is it not a fact, Mr. Signor, that you went down there to make that inspection for the purpose of making a bid for the Signor Tie and Timber Company on these ties, knowing that they were unable to move them?

A. No, sir; I would not take them on that inspection. I would not buy them on that inspection.

Q. You would not have bought them?

A. Not on that inspection.

289 Q. Why?

A. I made the best inspection I could under the circumstances.

Q. Within thirty days your company made an offer for them?

A. I understand they did.

Q. You know they did, don't you?

A. I heard so.

Q. You made a report to your company?

A. Yes, I made a report like this I gave to them.

Q. Didn't you personally go to the office of the American Tie and Timber Company at Shreveport to see Mr. Marshall after you made that alleged inspection and ask him what he would take for these ties?

A. I think I did.

Q. Were you going on the information you got?

A. No, sir; if I had bought these ties I would take them on shoulder inspection, what we call "shoulder" inspection.

Q. You mean inspect them again?

A. Had some one else inspect them."

Plaintiff rests.

Mr. GLASS: We have some testimony in rebuttal.

The COURT: Is this sur-rebuttal?

Mr. GLASS: I think so, it is in rebuttal of Mr. Petty and Mr. Burke.

Mr. GLASS: The Western Classification 43 has been introduced, but it is only two specific places, on page 78 and page 79; it is not a dozen lines altogether.

Mr. RODGERS: We want to save an exception; that would not be binding upon the plaintiff because the railroads might have an arrangement between themselves relieving each other as to how they will act in certain instances. In other words, that a railroad could not change a general custom of business or general classification of a product by reason of the fact that they among themselves agreed to let each one make such regulation as it sees fit. We want to save an exception on that ground.

290 The COURT: I don't know what it is to be.

Mr. GLASS: It is page 78, Western Classification, under the head of "Lumber" include ceiling, flooring, except wood carpet and wainscoting, carloads of 34,000 pounds, minimum weight 34,000 in Class B. Page 79, "Lumber, N. O. S. (Not otherwise specified) but exclusive of foreign woods of value, viz: mahogany, rosewood, lignum vitae and other foreign woods; also of cherry, holly and walnut." Refer to lumber tariff rates."

J. J. MARSHALL recalled by the defendant, testified as follows:

(By Mr. GLASS:)

Q. Mr. Marshall, you testified in this case before as a witness on the former trial?

A. Yes, sir.

Q. Did you testify—this question was propounded to you:

"Q. December 17 you received a letter from Mr. Griffith, the purchasing agent, stating they would cancel the contract."

A. Yes.

"Q. This is the letter (hands witness letter)?

"A. Yes, sir; that is the letter.

"Q. Did you cease to ship ties then?

"A. I explained to Mr. Griffith in person that we had some twenty or thirty cars we were ready—I was in Omaha when he handed me that letter; I told him we had twenty or thirty cars his inspectors had inspected and wished to send them in and he rescinded that that far that we might ship what we had now loaded; not to exceed twenty cars."

A. That is virtually my testimony and it is a fact.

Q. You shipped these?

A. Yes, and then stopped.

Q. You didn't make any demand — these ties?

A. No, sir. I didn't think I had a right to.

Q. You remember you testified to that?

A. Yes, sir; that is virtually my testimony.

Cross-examined.

(By Mr. RODGERS:)

Q. The contract was cancelled by Mr. Griffith?

291 A. Yes, sir.

Q. You explained and he permitted you to ship about twenty cars the inspectors had already taken and you had loaded?

A. Yes, not exceeding twenty cars, was the agreement.

Q. With reference—when you say "rescinded" you mean he opened up the contract, or did he just rescind——

A. His statement was that he would take no more, but upon my statement he agreed to rake [take] what we had already loaded.

Q. The contract was cancelled?

A. Yes, sir.

Both sides closed.

And be it further remembered, that at the conclusion of the testimony the defendant presented to the Court the following motion:

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

No. 2470.

AMERICAN TIE & TIMBER COMPANY
vs.
THE TEXAS & PACIFIC RAILWAY CO.

Now comes the defendant, after the close of the testimony, and moves the Court to dismiss this cause without prejudice, because under the facts and circumstances now disclosed by the record, and compatably with the Act of Congress of the United States to regulate interstate commerce, this Court has no power to consider and decide the subject matters which are complained of, or to award the relief prayed for by plaintiff.

HIRAM GLASS AND
T. B. McCORMICK,
Att'ys for Defendant.

Indorsed: No. 2470. Amer. Tie & Timber Co. vs. Texas & Pacific Ry. Co. Motion to Dismiss. Filed May 11, 1910. Louis C. Maynard, Clerk.

Upon the presentation of same and argument being had thereon, the Court overruled said motion, to which defendant then and there in open court excepted.

292 And thereupon the Court charged the jury as follows:

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

No. 2470.

AMERICAN TIE & TIMBER COMPANY, LIMITED,
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY.

Charge of the Court.

GENTLEMEN OF THE JURY:

The uncontroverted evidence also shows that plaintiff on the defendant issued and filed with the Interstate Commerce Commission of the United States, its Joint Through Lumber Tariff, T. & P. No. 8500-H, effective June 1, 1901, applying on lumber, carloads, all kinds except walnut, cherry, butternut and foreign woods of value, and also specifying other articles taking the same rate, from points on the line of said railroad to points in Kansas, by which the defend-

ant established and put into effect a rate between points on its line in Texas and Louisiana, to the town of Linwood, Kansas, of twenty-four cents per hundred pounds on oak lumber, among other things, which rate of twenty-four cents from that time and continuously thereafter was in effect until and including the dates of the transaction complained of by the plaintiff.

The uncontroverted evidence also shows that the plaintiff on the 23 day of July, 1907, made a contract with the Union Pacific Railway Company to deliver and sell to it 150,000 oak cross ties at Linwood, Kansas, 60,000 of them to be transported over the defendant's line of railway, delivery to begin on or before the first day of October, 1907, and continue at the rate of 15,000 per month, until delivery should be completed, at the price of 86 cents per tie. It is alleged and there is evidence tending to prove, that between the date of the contract and November 30, 1907, and dates subsequent thereto, plaintiff accumulated at stations along defendant's line at points in Louisiana and Arkansas, for the purpose of shipping over defendant's line of railway, 45,571 cross ties of the 60,000, made of wood, sawn, riven and hewn, in conformity with its contract with the Union Pacific Railway Company, which were distributed at the different points named in plaintiff's petition, and on or about the 10 day of October, 1907, plaintiff requested to be furnished with cars to be loaded with cross ties to be transported to Linwood, Kansas;
293 that defendant transported and delivered three cars of said cross ties, aggregating 1030 ties at said rate of twenty-four cents per hundred pounds, but thereafter continuously refused to receive and transport said ties under its rate of twenty-four cents per hundred pounds, then in effect on lumber between points in Texas and Louisiana and Linwood, Kansas, or under any other rate.

The uncontroverted evidence shows that by reason of the defendant's failure and refusal to accept from the plaintiff and transport the ties called for by plaintiff's contract with the Union Pacific Railway Company, the contract of the plaintiff with that road was breached and not fulfilled by the plaintiff.

Under the pleadings and evidence in this case the liability of the defendant to plaintiff for damages suffered by the latter because of the breach of its contract with the Union Pacific Railway Company for the sale and purchase of the oak railway cross ties, depends upon whether or not at the time plaintiff offered its ties for transportation, the defendant had in effect a rate under which it could lawfully transport them.

If you find that it did have in effect such a rate, then the defendant's refusal to accept the ties from plaintiff for shipment was wrongful and the plaintiff would be entitled to recover damages suffered by it by reason of the breaching of the contract as hereinafter charged. If you find the defendant did not have in effect such a rate, then the defendant could not lawfully ship the ties over it and your verdict should be for the defendant.

In reaching your conclusion as to whether the defendant did or did not have in effect a rate covering the oak ties offered for shipment, you are called upon to determine whether or not such ties are

lumber within the meaning and usage of the lumber and railroad business.

If you believe from the evidence that oak railway cross ties are lumber within the meaning and usage of the lumber and railroad business, then you are charged the defendant had in effect a rate applying on the ties offered for shipment, because there was in effect at that time defendant's Joint Through Lumber Tariff, T. & P. 8500-H, and the plaintiff would be entitled to the damages complained of by it as a consequence of the breaching of its contract for ties with the Union Pacific Railway Company as hereinafter charged you.

If you fail to find from the evidence that oak railway cross ties are lumber within the meaning and usage of the lumber and railroad business, your verdict will be for the defendant.

294 If on the foregoing issues you find for the plaintiff, then you will proceed to assess the damages suffered by plaintiff. As such damages, the plaintiff would be entitled to recover as actual damages an amount equal to the difference it would have received for the 44,541 oak cross ties under its contract with the Union Pacific Railway Company and the value of said cross ties at the time the defendant caused plaintiff to breach its contract and at the places where said ties were then located; and also for an amount equal to the difference between the contract price of the remaining 14,429 of said 60,000 cross ties and the cost which you find from the evidence would necessarily have been incurred by plaintiff in the fulfillment of its contract as to such remaining ties.

You should also allow interest at the rate of six per cent. per annum on the total amount so found by you, from the first day of January, 1908.

The burden is on the plaintiff to make out its case against the defendant by a preponderance or greater weight of the evidence and unless it has done so you should find for the defendant.

You gentlemen are the exclusive judges of the credibility of the witnesses, of the weight of the evidence and of the facts proved, but you will receive the law of the case from the charge of the Court.

EDWARD R. MEEK, *Judge.*

And following the main charge, at the request of the defendant, the Court charged the jury as follows:

Special Charge No. 5.

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

2470.

AMERICAN TIE & TIMBER COMPANY
vs.
THE TEXAS & PACIFIC RY. CO.

Special Charge No. 5 Requested by the Defendant, Texas & Pacific Railway Co.

GENTLEMEN OF THE JURY:

You are instructed that the law requires railway companies
295 in the promulgation of their tariffs to make the same specific, and they are not allowed to apply a tariff to analogous articles not therein specifically named.

HIRAM GLASS AND
T. B. McCORMICK,
Att'ys for Def't, The T. & P. Ry. Co.

Given.

E. R. MEEK, *Judge.*

Indorsed: No. 2470. American Tie & Timber Co. vs. The T. & P. Ry. Co. Special Charge No. 5, requested by Def't The T. & P. Ry Co.

Special Charge No. 7.

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

No. 2470.

AMERICAN TIE & TIMBER CO.
vs.
THE TEXAS & PACIFIC RY. CO.

Special Charge No. 7 Requested by Defendant, The Texas & Pacific Railway Company.

GENTLEMEN OF THE JURY:

You are instructed that if you find and believe from the evidence that oak railway cross ties are an analogous article to lumber, but are not properly included within the term lumber, as used in the lumber trade and in the construction of railway tariffs, then you are instructed that the T. & P. Railway Company in this case could not

have applied the lumber rate to said ties and you will, therefore, find for the defendant.

HIRAM GLASS AND
T. B. McCORMICK,
Att'ys for Def't, The T. & P. Ry. Co.

Given.

E. R. MEEK, *Judge.*

Indorsed: No. 2470. American Tie & Timber Co. vs. The T. & P. Ry. Co. Special Charge No. 7, requested by the Def't, The T. & P. Ry. Co.

And the Court refused the following special charge requested by the defendant and the defendant at said time and before the
296 jury retired in each instance, excepted in open Court:

Special Charge No. 1.

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

No. 2470.

AMERICAN TIE & TIMBER CO.
vs.
THE TEXAS & PACIFIC RY. CO.

Special Charge No. 1 Requested by Defendant, The Texas & Pacific Railway Co.

GENTLEMEN OF THE JURY:

You are instructed that at the time plaintiff made application to the T. & P. Ry. Co. and at the times complained of herein, that the defendant failed or refused to transport the plaintiff's ties, the defendant did not have in effect a rate by which it could lawfully transport said ties and you are therefore instructed to find a verdict for the defendant.

HIRAM GLASS AND
T. B. McCORMICK,
Att'ys for Def't The T. & P. Ry. Co.

Refused.

E. R. MEEK, *Judge.*

Indorsed: No. 2470. American Tie & Timber Co. vs. The Texas & Pacific Ry. Co. Special Charge No. 1, requested by Def't The T. & P. Ry. Co. Filed May 12, 1910. Louis C. Maynard, Clerk.

Special Charge No. 2.

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

No. 2470.

AMERICAN TIE & TIMBER CO.
vs.
THE TEXAS & PACIFIC RY. CO.

Now comes the defendant, The Texas & Pacific Railway Company, and in the event that its first special requested instruction should not be given, it asks the Court to charge the jury as follows:

297 GENTLEMEN OF THE JURY:

You are instructed that at the time the plaintiff made application and demanded that the defendant transport its ties under the defendant's lumber rate, the defendant did not have in effect any tariff that specifically included oak ties, and, unless you believe that the commodity and article known as oak railway ties came within the general term of lumber as commonly understood by men engaged in railway service engaged in the promulgation and construction of tariffs, or unless you believe that said article of ties was commonly understood to fall within the term of lumber by men engaged in that trade, and so understood to fall within the term of lumber when used in a rate sense, then you will find for the defendant.

HIRAM GLASS AND
T. B. McCORMICK,
Att'ys for Deft. The T. & P. Ry. Co.

Refused.

E. R. MEEK, *Judge.*

Indorsed: No. 2470. American Tie & Timber Co. vs. The Texas & Pacific Ry. Co.. Special Charge No. 2, requested by Deft. The T. & P. Ry. Co. Filed May 12, 1910. Louis C. Maynard, Clerk.

Special Charge No. 3.

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

No. 2470.

AMERICAN TIE & TIMBER CO.
vs.
THE TEXAS & PACIFIC RY. CO.

Special Charge No. 3 Requested by Defendant, The Texas & Pacific Railway Co.

GENTLEMEN OF THE JURY:

If you believe from the evidence that the Union Pacific Railway Company was informed and knew that the plaintiff was unable to, and that it failed to ship and deliver to said railroad 15,000 ties in October, and 15,000 during November, 1907; and if you further believe from the evidence that said railroad company did not promptly, on coming into possession of such knowledge, if any, cancel and terminate the contract described in plaintiff's petition
298 and give notice thereof to plaintiff; and if you find from the evidence that on or about December 5, 1907, the plaintiff resumed the shipment and deliveries of ties to said railroad company and that it was then in position and able to continue its deliveries of ties so as to complete the contract within ten months from October 1, 1907, and if you further find from the evidence that afterwards, with a full knowledge of the foregoing, if you find it had such knowledge, the Union Pacific Railroad recognized and acknowledged the continued existence of said contract and agreed to still carry out and be bound by the terms thereof, then I charge you that said railroad did not have the legal right to cancel said contract, and if you believe from the evidence that, without further default, knowledge or consent of defendant the Union Pacific Railroad, with or without the consent of plaintiff, cancelled said contract and refused to take any pay for further ties under the same, then I charge you that plaintiff cannot recover and you will return a verdict for defendant.

HIRAM GLASS AND
T. B. McCORMICK,
Attorneys for Defendant.

Refused.

E. R. MEEK, *Judge.*

Indorsed: No. 2470. American Tie & Timber Co. vs. The Texas & Pacific Railway Co. Special Charge No. 3, Requested by Defendant, The Texas & Pacific Ry. Co. Filed May 12, 1910. Louis C. Maynard, Clerk.

Special Charge No. 4.

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

No. 2470.

AMERICAN TIE & TIMBER CO.
vs.
THE TEXAS & PACIFIC RY. CO.

Special Charge No. 4 Requested by Defendant, The Texas & Pacific Railway Co.

GENTLEMEN OF THE JURY:

You are instructed that unless within the understanding of those engaged in the lumber or railroad traffic business the articles of oak railway cross ties comes within the general designation of
299 lumber, you will find your verdict herein for the defendant.

HIRAM GLASS AND
T. B. McCORMICK,
Att'ys for Def't, The T. & P. Ry. Co.

Refused.

E. R. MEEK, *Judge.*

Indorsed: No. 2470. American Tie & Timber Co. vs. The Texas & Pacific Ry. Co. Special Charge No. 4, Requested by Deft. The T. & P. Ry. Co. Filed May 12, 1910. Louis C. Maynard, Clerk.

Special Charge No. 6.

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

No. 2470.

AMERICAN TIE & TIMBER CO.
vs.
THE TEXAS & PACIFIC RY. CO.

Special Charge No. 6 Requested by Defendant, The Texas & Pacific Rwailway [Railway] Co.

GENTLEMEN OF THE JURY:

You are instructed that if you find and believe from the evidence that the plaintiff, American Tie & Timber Company, consented to the cancellation of its contract by the Union Pacific Railway Company, then you will find for the defendant.

HIRAM GLASS AND
T. B. McCORMICK,
Att'ys for Def't, The T. & P. Ry. Co.

Refused.

E. R. MEEK, *Judge.*

Indorsed: No. 2470. American Tie & Timber Co. vs. The T. & P. Ry. Co. Special Charge No. 6, Requested by Deft. The Texas & Pacific Ry. Co. Filed May 12, 1910. Louis C. Maynard, Clerk.

The Court also refused defendant's Special Requested Instruction No. 8, which said instruction was offered and requested by the defendant only after the Court had indicated positively that he
300 would decline to submit the question as to whether the cancellation of the contract by the Union Pacific was wrongful and the proximate cause of the plaintiff's damage, but would only submit whether the damage arose from a wrongful failure of the defendant to transport the ties. The Court refused said Special Charge No. 8 and the defendant duly excepted in open court and before the jury retired to such refusal. Said special requested instruction No. 8 was as follows:

Special Charge No. 8, Requested by Defendant, The Texas & Pacific Railway Co.

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

No. 2470.

AMERICAN TIE & TIMBER CO.
vs.
THE TEXAS & PACIFIC RY. CO.

GENTLEMEN OF THE JURY:

You are instructed that under the pleadings and evidence in this case there is only one question bearing on liability or not for you to decide, and that is whether or not at the time the plaintiff offered its ties for transportation, the defendant had in a rate under which it could lawfully transport them. If it did have in such a rate the defendant's refusal was wrongful and entitles the plaintiff to a recovery of his damages. If the defendant did not have in such a rate, then the defendant is entitled to your verdict.

If you find that oak railway cross ties are lumber within the meaning and usage of the lumber and railroad business, then it will be your duty to find for the plaintiff. If you find that railway cross ties are not lumber within such meaning and usage you will find for the defendant.

HIRAM GLASS, AND
T. B. McCORMICK,
Att'ys for Deft. The T. & P. Ry. Co.

Given in substance in main charge.

E. R. MEEK, *Judge.*

Indorsed: No. 2470. American Tie & Timber Co. vs. The T. & P. Ry. Co. Special Charge No. 8, Requested by Deft. The T. & P. Ry. Co. Filed May 12, 1910. Louis C. Maynard, Clerk.

301 And now in furtherance of justice and that right may be done, the defendant, The Texas and Pacific Railway Company, tenders and presents the foregoing as its bill of exceptions in this case to the action of the Court, which bill of exceptions is agreed to by the plaintiff, and prays that the same may be styled and allowed and filed and sealed by the Court and made a part of the record, and the same is accordingly done, this 18th day of October, A. D. 1910.

EDWARD R. MEEK,
U. S. District Judge for the Northern District of Texas, Presiding on the Trial of said Cause.

It is agreed that the foregoing bill of exceptions contains a true and correct statement of the evidence adduced and charges given and refused. This Octo. 5th, 1910.

RODGERS & DOROUGH,
Att'y- for Plaintiff.
T. B. McCORMICK,
HIRAM GLASS,
Att'ys for Defendant.

Indorsed: No. 2470 Law. American Tie & Timber Co. vs. Texas & Pacific Ry. Co. Bill of Exceptions. Filed Oct. 21st, 1910. Louis C. Maynard, Clerk.

Assignment of Errors.

Filed June 13, 1910.

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

No. 2470.

THE AMERICAN TIE & TIMBER COMPANY, LIMITED,
versus
THE TEXAS & PACIFIC RAILWAY COMPANY,

Comes now the Texas & Pacific Railway Company, defendant in the foregoing action, and in connection with its petition for writ of error makes the following assignment of errors which it avers occurred upon the trial of the above cause, to-wit:

I.

302 The Court erred in overruling and in not sustaining the defendant's motion made at the close of the evidence to dismiss this cause without prejudice on account of the same being such a case, as made by the pleadings and evidence, as would be cognizable in the first instance alone by the Inter-state Commerce Com-

mission and such that the Circuit Court should not entertain in the absence of a finding as to the facts by the Inter-state Commerce Commission. Said motion signed by attorneys for the defendant and presented at the close of the testimony was as follows:

"Now comes the defendant, after the close of the testimony, and moves the Court to dismiss this cause without prejudice, because under the facts and circumstances now disclosed by the record, and compatibly with the Acts of Congress of the United States to regulate Inter-state Commerce, this Court has no power to consider and decide the subject matters which are complained of, or to award the relief prayed for by the plaintiff."

II.

The Court erred in overruling the defendant's general exception for the reason that plaintiff's petition did not state a cause of action that could properly be litigated in this Court.

III.

The Court erred in overruling defendant's special exception No. two, because the matters set up in plaintiff's petition to which the same was directed were immaterial and prejudicial to the defendant.

IV.

The Court erred in overruling defendant's special exception No. 4, because it was nowhere sufficiently alleged that the defendant had such notice of the contract as would bind it in special damages.

V.

The Court erred in overruling and not sustaining defendant's special exception No. 6, directed against paragraphs 7 and 8 of the plaintiff's petition, for the reason that the damages sought to be recovered were not sufficiently pleaded and the damages were consequential and too remote.

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VI.

The Court erred in overruling defendant's special exception No. 7, directed to that portion of the plaintiff's petition wherein he sought recovery of attorney's fees.

VII.

The Court erred in not permitting the defendant to introduce the correspondence that passed between its general freight agent, E. L. Sargent, and its local agent at Fouke, Arkansas, which letters were so identified by both of said parties and tended to show that immediately upon it coming to the knowledge of the head of the freight department, that said agent had shipped ties to Inter-state points on its lumber tariff, his action was repudiated and he was directed to cease such practice and showed conclusively that

it was not the construction of the defendant company that the lumber tariff should apply to ties. The letters referred to are the following three:

Letter addressed to P. H. Hearn, T. & P. Agent at Fouke, Arkansas, dated Dallas, Texas, August 18th, 1907, signed by general freight agent, asking by what authority said agent was billing oak ties when there were no rates on same.

Reply letter from P. H. Hearn to E. L. Sargent, dated Fouke, Arkansas, October 20th, 1907, stating that said agent has been using lumber rates and T. P. tariff No. 10121-H under head of "Texas State Traffic," and asking what rates he should use on said shipments.

Reply letter from E. L. Sargent to P. H. Hearn, dated Dallas, Texas, October 22nd, 1907, advising said agent that Texas traffic rates did not apply on Inter-state shipments and for said agent to notify shippers that there were no rates in effect and that if said shippers would give the T. & P. Railway Company sufficient notice to publish it would establish a tariff.

VIII.

The Court erred in overruling defendant's special requested instruction number one in not charging the jury as a matter of law that oak railway ties are not lumber and that therefore the defendant was entitled to their verdict. Said special requested charge No. 1 was as follows:

304 "GENTLEMEN OF THE JURY:

You are instructed that at the time the plaintiff made application to the T. & P. Railway Company and at the time complained of herein, that the defendant failed or refused to transport the plaintiff's ties, the defendant did not have in effect a rate by which it could lawfully transport said ties and you are therefore instructed to find a verdict for the defendant."

IX.

The Court erred in overruling defendant's requested special instruction No. 3, because there was evidence sufficient to raise the question as to whether plaintiff's failure to carry out the contract was due to his not getting the rate he sought applied by the T. & P. to the shipment of his ties, or whether the same was caused by the wrongful cancellation of his contract by the Union Pacific or by the improvident consent of the plaintiff to the cancellation of said contract. Defendant's special requested instruction No. 3 was as follows:

"GENTLEMEN OF THE JURY:

If you believe from the evidence that the Union Pacific Railway Company was informed and knew that the plaintiff was unable to, and that it failed to ship and deliver to said railroad 15,000 ties in October and 15,000 during November, 1907; and if you further believe from the evidence that said railroad company did

not promptly, on coming into possession of such knowledge, if any, cancel and terminate the contract described in plaintiff's petition and give notice thereof to plaintiff; and if you find from the evidence that on or about December 5th, 1907, plaintiff resumed the shipments and deliveries of ties to said railroad company and that it was then in a position and able to continue its deliveries of ties so as to complete the contract within the ten months from October 1, 1907, and if you further find from the evidence that afterwards, with a full knowledge of the foregoing, if you find it had such knowledge, the Union Pacific Railroad recognized and acknowledged the continued existence of said contract and agreed to still carry out and be bound by the terms thereof, th*an* [then] I charge you that said railroad did not have the legal right to cancel said contract, and if you believe from the evidence that, without further default, knowledge or consent of defendant the Union Pacific Railroad, with or without the consent of plaintiff, cancelled said contract and refused to take and pay for further ties under the
305 same, then I charge you that plaintiff cannot recover and you will return a verdict for the defendant."

X.

The Court erred in overruling defendant's requested special instruction No. 6, because there was evidence sufficient to raise the questions as to whether or not the plaintiff itself had consented to the cancellation of its contract when the Union Pacific was not entitled to cancel same and when, but for such cancellation, the contract should have been carried out. Defendant's requested special instruction No. 6 was as follows:

"GENTLEMEN OF THE JURY:

You are instructed that if you find and believe from the evidence that the plaintiff, American Tie & Timber Company, Limited, consented to the cancellation of its contract by the Union Pacific Railway Company, then you will find for the defendant."

XI.

The court erred in overruling defendant's requested special instruction No. 2, because the same more fully than in the main charge, and properly, instructed the jury that in passing on the question of whether ties were lumber, they should be guided by the understanding of men engaged in dealing in or shipping the commodity of lumber, and in the promulgation and construction of tariffs relating to the same. Defendant's special requested instruction No. 2 was as fallows:

"Now comes the defendant, The Texas & Pacific Railway Company, and in the event that its first special requested instruction should not be given, it asks the Court to charge the jury as follows:

"GENTLEMEN OF THE JURY:

You are instructed that at the time the plaintiff made application and demanded that the defendant transport its ties under the

defendant's lumber rate, the defendant did not have in effect any tariff that specifically included oak ties and, unless you believe that the commodity or article known as oak railway ties came within the general term of lumber as commonly understood by men engaged in railway service engaged in the promulgation and construction of tariffs or unless you believe that said article of ties was
306 commonly understood to fall within the term of lumber by men engaged in that trade, and so understood to fall within the term of lumber when used in a rate sense, then you will find for the defendant."

XII.

The Court erred in overruling defendant's requested special instruction No. 4 for the reason last asigned above. Defendant's requested special instruction No. 4 was as follows:

"GENTLEMEN OF THE JURY:

You are instructed that unless within the understanding of those engaged in the lumber or railroad traffic business the article of oak railway cross ties comes within the general designation of lumber, you will find your verdict herein for the defendant."

XIII.

The Court erred in that part of its main charge at the top of the second page thereof, reading as follows:

"The uncontroverted evidence shows that the plaintiff on the 23rd day of July, 1907, made a contract with the Union Pacific Railway Company to deliver and sell to it 15,000 oak cross ties at Linwood, Kansas, 60,000 of them to be transported over the defendant's lien [line] of railway, delivery to begin on or before the 1st day of October, 1907, and continue at the rate of 15,000 per month until delivery should be completed, at the price of 86 cents per tie."

Because it is not stated in said contract what portion of said ties were to be moved over the line of the defendant railway company, or that it was necessary that 15,000 of said ties per month should be moved off of the line of this defendant, the evidence also showing that the plaintiff expected to move a greater per cent off of another railway company and there was neither pleading nor proof to show but that had he been able to move his ties from the other railway company on a similar rate claimed to have been in effect he would not have had to move said ties off of the line of this defendant during the first months, nor that he would have been damaged by his failure to be able to do so.

307 XIV.

The Court erred in that portion of his main charge beginning near the top of the third page thereof and reading as follows:

"The uncontroverted evidence shows that by reason of the defendant's failure and refusal to accept from the plaintiff and transport the ties called for by plaintiff's contract with the Union

Pacific Railway Company, the contract of the plaintiff with that road was breached and not fulfilled by the plaintiff."

Because by said charge the Court practically holds as a matter of law that there was no evidence tending to show that the contract was breached wrongfully by the Union Pacific, or that the plaintiff consented to the cancellation of the contract when it need not have done so, but could have insisted on its performance, and said charge is upon the weight of the evidence in a manner not warranted by the testimony in the case.

XV.

The Court erred in that portion of its main charge on the third page thereof, reading as follows:

"Under the pleadings and evidence in this case the liability of the defendant to plaintiff for damages suffered by the latter because of the breach of its contract with the Union Pacific Railway Company for the sale and purchase of oak railway ties depends upon whether or not at the time plaintiff offered its ties for transportation, the defendant had in effect a rate under which it could lawfully transport them."

"If yo- [you] find that it did have in effect such a rate, then the defendant's refusal to accept the ties from plaintiff for shipment was wrongful and the plaintiff would be entitled to recover damages suffered by it by reason of the breaching of the contract as hereinafter charged."

Because said charge practically instructs the jury that the failure of the railway company to receive and transport said ties, if it had any rate under which it could lawfully transport them, was the proximate cause of the plaintiff's damage, without regard to the testimony that had been introduced as to plaintiff's right and ability to carry out the contract had it not accepted the wrongful cancellation of same by the Union Pacific Railway Company. This was not invited error, because, through defendant's requested
308 special instruction No 8 contained somewhat similar language, the same was requested by the defendant and acted on by the Court, after it was announced by the Court and understood by the defendant that the Court would hold as a matter of law that the defendant's refusal to transport the ties was the direct cause of the breach of the contract.

XVI.

The Court erred in that portion of its main charge found on the fourth page thereof, reading as follows:

"If you believe from the evidence that oak railway ties are lumber within the meaning and usage of the lumber and railroad business, then you are charged that the defendant had in effect a rate applying on ties offered for shipment because there was in effect at that time defendant's joint through lumber tariff T. & P. 8500-H, and the plaintiff would be entitled to the damages complained of by it as the consequence of the breaching of

its contract for ties with the Union Pacific Railway Company as hereinafter charged you."

Because the same assumes that the breach of said contract was the direct and proximate result of the defendant's refusal to carry the ties on said tariff.

XVII.

The Court erred in all that portion of its charge submitting the measure of damages:

(*a*) In allowing the plaintiff to recover the difference between its anticipated profits under the contract and what it would have received for 44,541 ties at the place where said ties were then located because the evidence showed that the plaintiff afterwards sold the ties and he was only entitled to recover its actual loss.

(*b*) In allowing the plaintiff to recover the difference between the contract price of the remaining 14,429 of the 60,000 ties which it had expected to collect and ship because said ties were never collected and the plaintiff's intention to collect the same might or might not have been carried out, irrespective of this defendant's action and did not constitute a proper basis for damages; and

309 (*c*) If the plaintiff was entitled to recover anything by reason of said 14,429 ties, it would have been only by the difference between his anticipated profit under the contract and not the difference between the contract price of said ties and the price of said ties at the place where they were to have been collected, had the plaintiff's intention been carried out, and this portion of the charge is so indefinite and uncertain that it did not afford the jury a safe or a certain basis for calculating the damages which they wished to award the plaintiff. The plaintiff should not have been allowed to recover the difference between the contract price and the cost of getting out the ties, because the proof showed that had the plaintiff gotten out the 14,429 ties it could have sold the same at a profit of at least five cents a tie and the plaintiff ought not, therefore, to have been allowed to recover something over 13 cents a tie.

XVIII.

The verdict of the jury is against the great weight and preponderance of the testimony and is contrary to the evidence. The evidence established that ties were not lumber.

XIX.

The verdict of the jury is excessive and shows plainly that the same includes in the calculation the full 60,000 less on 1,030, whereas the proof showed that there was ten per cent, of the ties that would not have been accepted under the contract and shows also that the jury accepted the plaintiff's testimony as to the weight of the ties, whereas, the testimony showed by a great preponderance that ties made out of oak of standard measurements would weight [weigh] an average of ten or fifteen pounds more than the weight plaintiff used as the basis of his calculation and, therefore, the expense of handling and freight would have been much greater and the profit much less.

XX.

The Court erred in allowing the plaintiff's attorneys the sum of twenty-five hundred ($2500.00) dollars as attorney's fees, because.

(*a*) Attorney's fees were not properly recoverable by the plaintiff in this case; and,

310 (*b*) Because the amount allowed is excessive.

HIRAM GLASS AND
T. B. McCORMICK,
Attorneys for the Defendant, Texas & Pacific Railway Company.

Indorsed: In the Circuit Court of the United States for the Northern District of Texas, at Dallas. American Tie & Timber Company, Limited, vs. No. 2470, The Texas & Pacific Railway Company. Assignment of Errors. Filed June 13th, 1910. Louis C. Maynard, Clerk.

Petition for Writ of Error.

Filed June 13, 1910.

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

No. 2470.

AMERICAN TIE & TIMBER CO., LIMITED,
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY.

The United States of America, Northern District of Texas, to the Honorable Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

The petition of The Texas & Pacific Railway Company shows that in the record and proceedings had in this cause and also in the rendition of the judgment in the above entitled cause, in the said United States Circuit Court for the Northern District of Texas, at Dallas, at the May term, 1910, thereof, against said defendant in the above suit, on the 12th day of May, 1910, certain errors were committed to the prejudice of this defendant, all of which will more fully appear from the assignment of error herewith filed:

Wherefore, defendant The Texas & Pacific Railway Company, prays that a writ of error may issue in this behalf to the United States Circuit Court of Appeals, for the Fifth Judicial Circuit, for the correction of the errors complained of and that a transcript of the record, proceedings and papers in this cause duly authenticated, may be sent to the Circuit Court of Appeals for the Fifth

311 Judicial Circuit; that the court in its order fix the amount of the writ of error bond and make such other orders and

cause and permit such other process to issue and be served as r
cause the said judgment to be reviewed and corrected by the Un
States Circuit Court of Appeals for the Fifth Circuit to be holde
the City of New Orleans, La.

HIRAM GLASS AND
T. B. McCORMICK,
Attorneys for Petitioner The Texas &
Pacific Railway Company

Indorsed: No. 2470. American Tie & Timber Compa
Limited, vs. The Texas & Pacific Railway Company. Petition
Writ of Error. Filed June 13th, 1910. Louis C. Maynard, Cl

Order Allowing Writ of Error.

Filed and Entered June 13th, 1910.

In the United States Circuit Court for the Northern District
Texas, at Dallas.

No. 2470.

AMERICAN TIE & TIMBER CO., LIMITED,
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY.

It appearing to the Court that the defendant, The Texas a
Pacific Railway Company, has filed in this cause an assignment
errors and petition for writ of error to the United States Circ
Court of Appeals for the Fifth Circuit, from the final judgme
heretofore rendered in the above named cause, on the 12th day
May, 1910.

It is ordered by the Court that the said defendant be and he
hereby allowed a writ of error to the United States Circuit Court
Appeals for the Fifth Circuit upon giving bond according to l
in the sum of twenty-three thousand ($23,000.00) dollars, whi
shall operate as a supersedeas.

This the 13th day of June, A. D. 1910.

EDWARD R. MEEK,
Judge Presiding.

Indorsed: No. 2470. In the United States Circuit Court for t
Northern District of Texas, at Dallas. American Tie
312 Timber Company, Limited, vs. The Texas & Pacific Railw
Company. Order Allowing Writ of Error. Filed Ju
13th, 1910. Louis C. Maynard, Clerk.

Supersedeas Writ of Error Bond.

Filed and Approved June 13th, 1910.

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

No. 2470.

AMERICAN TIE & TIMBER CO., LIMITED,
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY.

Know all men by these presents, That we, The Texas & Pacific Railway Company, a corporation, as principal, and the other subscribers hereto, as sureties, are held and firmly bound unto the American Tie & Timber Company, Limited, in the full and just sum of twenty-three thousand ($23,000.00) dollars, to be paid to the American Tie & Timber Company, Limited, their certain attorneys, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves our heirs, executors, administrators or assigns, jointly and severally by these presents.

Sealed with our seals and dated this the 13th day of June, in the year of our Lord 1910.

Whereas, lately at a Circuit Court of the United States for the Northern District of Texas, at Dallas, in a certain suit peding in said Court, wherein the American Tie & Timber Company, Limited, was plaintiff, and The Texas & Pacific Railway Company was defendant, a judgment was rendered against the said The Texas & Pacific Railway Company, upon the trial of said cause, and said The Texas & Pacific Railway Company having obtained a writ of error in said cause and filed a copy thereof in the clerk's office of said Court, to revise the aforesaid judgment, and a citation directed to the said American Tie & Timber Company, Limited, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Fifth Circuit to be held in the City of New Orleans, in said Circuit, within thirty days.

313 Now, therefore, the condition of the above obligation is such that if the said Texas & Pacific Railway Company shall prosecute said writ of error to effect and satisfy all damages and costs if it fail to make said plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

In witness whereof, we have hereunto signed, sealed and delivered this obligation on the day above written.

THE TEXAS & PACIFIC RAILWAY COMPANY,
By HIRAM GLASS AND
T. B. McCORMICK,
Its Attorneys.

Sureties:
EDW. O. TENISON.
C. R. BUDDY.

Approved as a supersedeas bond by me, this 13th day of June, A. D. 1910.

EDWARD R. MEEK,
United States District Judge.

Indorsed: In the District Court of the United States for the Northern District of Texas, at Dallas. American Tie & Timber Company, Limited, versus The Texas & Pacific Railway Company. Supersedeas Writ of Error Bond. Filed June 13th, 1910. Louis C. Maynard, Clerk.

* * * * * * *

314 *Clerk's Certificate.*

I, Louis C. Maynard, clerk of the Circuit Court of the United States in the Fifth Circuit and Northern District of Texas, do hereby certify that the above and foregoing is a full, true and correct transcript of the record, assignment of errors, and all the proceedings in cause No. 2470, wherein American Tie and Timber Company, Limited, is plaintiff, and The Texas & Pacific Railway Company is defendant, except that the original writ of error and citation in error are included therein instead of copies thereof, as fully as the same remains on file and of record in my office, at Dallas, Texas.

Witness my hand officially, and the seal of said Court, at Dallas, Texas, this the 24th day of November, A. D. 1910.

[SEAL.] LOUIS C. MAYNARD, *Clerk,*
By GEO. W. MITCHELL, *Deputy.*

315 *Argument and Submission.*

Nov. 9, 1911.

No. 2163.

THE TEXAS & PACIFIC RAILWAY CO.
vs.
AMERICAN TIE & TIMBER CO., LTD.

On this day this cause was regularly called, and after argument by Hiram Glass, Esq., for plaintiff in error, and R. W. Rodgers, Esq., for defendant in error, was submitted to the court.

Opinion.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2163.

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
v.
AMERICAN TIE & TIMBER COMPANY, Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Texas.

Before Pardee and Shelby, Circuit Judges, and Grubb, District Judge.

By the COURT:

This action is one brought to recover damages under section 8 of the Act to Regulate Commerce. The questions involved are whether there was a joint rate lawfully established between certain points on the Texas & Pacific Railway and certain other points on the Union Pacific Railway on cross ties and, if so, whether the
316 plaintiff in error disregarded and refused to comply with the same and therein and thereby unlawfully discriminated against the defendant in error.

On this state of the case we have no doubt as to the jurisdiction of the Court. Under section 8 reasonable counsel fees are authorized to be fixed by the Court in every case of recovery. The amount allowed for counsel fees in this case appears to be reasonable in the light of the record and our judicial knowledge of the services rendered.

Upon an inspection of the whole record, we find no reversible error in any of the rulings below.

The judgment of the Circuit Court in affirmed.

(Original filed Dec. 5, 1911.)

Final Judgment.

No. 2163.

THE TEXAS & PACIFIC RAILWAY COMPANY
vs.
AMERICAN TIE & TIMBER CO., LTD.

This cause came on to heard on the transcript of the record from the Circuit Court of the United States for the Northern District of Texas, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this court that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the plaintiff in error, The Texas & Pacific Railway Company, and the sureties on the writ of error bond herein, Edw. O. Tenison and C. R. Buddy, be condemned to pay the costs of this cause in this court, for which execution may be issued out of said Circuit Court.

Dec. 5, 1911.

317 *Petition for Rehearing.*

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 2163.

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
AMERICAN TIE & TIMBER COMPANY, LTD., Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Texas.

Petition for Rehearing.

Hiram Glass, T. B. McCormick, Attorneys for Plaintiff in Error. W. L. Hall, of Counsel.

U. S. Circuit Court of Appeals. Filed Dec. 21, 1911. Frank H. Mortimer, Clerk.

318 In the United States Circuit Court of Appeals, Fifth Circuit.

No. 2163.

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
AMERICAN TIE & TIMBER COMPANY, LTD., Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Texas.

Petition for Rehearing.

May it Please the Court:

Comes now the Texas & Pacific Railway Company, plaintiff in error, and prays the court to grant it a rehearing, and reverse the judgment of the Circuit Court and dismiss this cause without prejudice, or reverse the judgment of the Circuit Court and remand the cause for a new trial, for the following reasons, to-wit:

319 First.

The court erred in holding that under the facts and circumstances disclosed by the record, and compatibly with the acts of Congress

of the United States to regulate interstate commerce, the Circuit Court had power to consider and decide the subject- matters which are complained of and to award the relief prayed for by the defendant in error.

Second.

The court erred in holding that the Circuit Court had jurisdiction and power to determine whether or not railroad cross ties are lumber, the evidence on that issue being conflicting and sufficient to warrant a finding that such cross ties are or are not lumber, because the determination of such issue, under the facts disclosed by the record, was and is primarily and exclusively for the Interstate Commerce Commission.

Third.

The Court erred in holding that the Circuit Court had power and jurisdiction to determine the issues in this cause and award the relief prayed for; and in failing and refusing to hold that where the proper determination of a suit, brought under Section 9 of the Act of Congress to Regulate Commerce, as amended June 29, 1906, is dependent upon the determination of an issue of fact, and where the evidence is conflicting and sufficient to sustain a finding, either in favor of or against such issue, and where the findings of such issue differently would produce different results, and cause a want of uniformity in the construction of tariffs of interstate rates, the determination of such issue is primarily for the Interstate Commerce Commission, and the Circuit Court has no power to determine such issue.

Fourth.

The court erred in holding, under the facts disclosed by the record in this cause, that the Circuit Court had the power, under the Interstate Commerce Act, to determine the issues of fact, and award the relief prayed for, because such holding will lead to a want
320 of uniformity in construing and enforcing railroad tariffs of interstate rates.

Fifth.

The court erred in overruling and not sustaining the eleventh assignment of error of plaintiff in error, complaining of the action of the Circuit Court in refusing to instruct the jury to return a verdict for plaintiff in error.

Sixth.

The court erred in affirming the judgment of the Circuit Court awarding damages for the failure of the plaintiff in error to transport railroad oak cross ties from points in Louisiana to a point in Kansas, because plaintiff in error had not published and filed with the Interstate Commerce Commission the rates, fares and charges for the transportation of such cross ties as required by Section 6 of the Act of Congress to Regulate Interstate Commerce, as amended

June 29, 1906, and plaintiff in error was therefore prohibited by said Section 6 of the Interstate Commerce Act from transporting, or participating in the transportation of, such cross ties.

Seventh.

The court erred in affirming the judgment of the Circuit Court awarding damages against the plaintiff in error for failure to transport, in interstate commerce, railroad oak cross ties, because, under the facts disclosed by the record in this cause, plaintiff in error was prohibited from transporting, or participating in the transportation of such ties, by Section 6 of the Act of Congress to Regulate Commerce, approved February 11, 1887, as amended June 29, 1906.

Eighth.

The court erred in holding that, under the facts disclosed by the record in this cause, it was the duty of plaintiff in error to have transported, in interstate commerce, the railroad oak cross ties of the defendant in error, because the plaintiff in error, under
321 the Act of Congress to Regulate Commerce, approved February 11, 1887, as amended June 29, 1906, could not lawfully transport, or participate in the transportation of, such ties.

Ninth.

The court erred in holding that hewn oak railroad cross ties are lumber, and can lawfully be transported under a tariff and schedule of rates for the transportation of lumber.

Tenth.

The court erred in overruling and refusing to sustain the plaintiff in error's eighth assignment of error, complaining of the action of the Circuit Court in refusing to peremptorily instruct the jury to return a verdict for plaintiff in error.

Eleventh.

The court erred in overruling and not sustaining the seventh assignment of error of the plaintiff in error, which is as follows:

"The court erred in not permitting the defendants to introduce the correspondence that passed between its general freight agent, E. L. Sargent, and its local agent, at Fouke, Arkansas, which letters were so identified by both of said parties, and tended to show that immediately upon its coming to the knowledge of the head of the freight department, that such agent had shipped ties to interstate points on its lumber tariffs, his action was repudiated, and he was instructed to cease such practice, and showed conclusively that it was not the construction of the defendant company that the lumber tariff should apply to ties. The letters referred to are the following three:

"Letter addressed to P. H. Hearn, T. & P. agent at Fouke, Arkansas, dated August (October) 18, 1907, and signed by general freight agent, asking by what authority said agent was billing oak ties when there was no rate on same.

"Reply letter from P. H. Hearn to E. L. Sargent, dated Fouke, Arkansas, October 20, 1907, stating that said agent has been using lumber rates and T. & P. Tariff No. 10,121-H under head of
322 'Texas State Traffic,' and asking what rates should be applied on said shipments.

"Reply letter from E. L. Sargent to P. H. Hearn, dated Dallas, Texas, October 22, 1907, advising said agent that Texas tariff rates did not apply on interstate shipments, and for said agent to notify shippers that there were no rates in effect, and that if said shippers would give the T. & P. Railway Company sufficient notice to publish it would establish a tariff."

Twelfth.

The court erred in holding that the Circuit Court properly refused to submit the issue of whether or not the defendant in error consented to the cancellation of its contract with the Union Pacific Railroad Company, and thereby caused its damages.

Thirteenth.

The court erred in holding that the Circuit Court did not commit error in refusing plaintiff in error's special instruction No. 3, which was as follows:

"Gentlemen of the Jury: If you believe from the evidence that the Union Pacific Railway Company was informed and knew that the plaintiff was unable to, and that it failed to ship and deliver to said railroad 15,000 ties in October and 15,000 during November, 1907; and if you further believe from the evidence that said railroad company did not promptly, on coming into possession of said knowledge, if any, cancel and terminate the contract described in plaintiff's petition and give notice thereof to plaintiff; and if you find from the evidence that on or about December 5, 1907, the plaintiff resumed the shipments and deliveries of ties to said railroad company, and that it was then in a position and able to continue its deliveries of ties, so as to complete the contract within the ten months from October 1, 1907, and if you further find from the evidence that afterwards, with a full knowledge of the foregoing, if you find it had such knowledge, the Union Pacific Railroad recognized and acknowledged the continued existence of said contract, and agreed to still carry out and be bound by the terms thereof
323 then I charge you that said railroad did not have the legal right to cancel said contract, and if you believe from the evidence that, without further default, knowledge or consent of defendant, the Union Pacific Railroad Company, with or without the consent of plaintiff, cancelled said contract and refused to take and pay for further ties under the same, then I charge you that

plaintiff can not recover and you will return a verdict for the defendant."

Because there was evidence sufficient to raise the question as to whether the plaintiff's failure to carry out the contract was due to the failure of the Texas & Pacific Railway Company to transport cross ties in October and November, 1907, or was caused by the wrongful cancellation of the contract by the Union Pacific Railroad Company, or by the improvident consent of the defendant in error to the cancellation of such contract.

Fourteenth.

The court erred in overruling and failing to sustain the twelfth assignment of plaintiff in error, which is as follows:

"The court erred in overruling defendant's requested special instruction No. 4, for the reason last assigned above."

Defendant's requested special instruction No. 4 was as follows:

"Gentlemen of the Jury: You are instructed that unless within the understanding of those engaged in the lumber or railroad traffic business the article of oak railway cross ties comes within the general designation of lumber, you will find your verdict herein for the defendant."

Fifteenth.

The court erred in holding that the Circuit Court did not err in charging the jury as follows:

324 "The uncontradicted evidence shows that by reason of the defendant's failure and refusal to accept from plaintiff and transport ties called for by plaintiff's contract with the Union Pacific Railway Company, the contract of the plaintiff with that road was breached and not fulfilled by the plaintiff."

Because there was evidence showing and tending to show that the contract with the Union Pacific Railroad Company was breached, not on account of the failure of the Texas & Pacific Railway Company to transport the cross ties, but was wrongfully breached by the Union Pacific Railway Company and acquiesced in by the defendant in error when it could have lawfully insisted upon its fulfillment.

Sixteenth.

The court erred in holding that the Circuit Court did not err in charging the jury as follows:

"If you believe from the evidence that oak railway cross ties are lumber within the meaning and usage of the lumber and railroad business, then you are charged that the defendant had in effect a rate applying on ties offered for shipment because there was in effect at that time defendant's joint through lumber tariff T. & P. 8500-H, and the plaintiff would be entitled to the damages complained of by it as the consequence of the breaching of its contract for ties with the Union Pacific Railway Company as hereinafter charged you"

Seventeenth.

The court erred in affirming the judgment of the Circuit Court for the full amount of $17,112.23 damages awarded by the verdict of the jury, because said sum and verdict is excessive and awards the sum of $3,530.78 more than the defendant in error was entitled to under the pleadings and evidence and charge of the court, considered in the most favorable light to the defendant in error.

Eighteenth.

The court erred in affirming the judgment of the Circuit Court and failing and refusing to reform the same by reducing the
325 amount of damages awarded by the jury to $13,581.45, that being the greatest amount that the jury, under the charge of the court, the pleadings and the evidence, would have been justified in finding and awarding the defendant in error as its damages.

Nineteenth.

The court erred in affirming the judgment of the Circuit Court awarding the defendant in error the sum of two thousand, five hundred dollars ($2,500) attorneys' fees, because that judgment is not supported or justified by the verdict of the jury, and there is no award of such sum, or any other sum, as attorneys' fees by the jury.

Respectfully submitted,

HIRAM GLASS,
T. B. McCORMICK,
Attorneys for Plaintiff in Error.

W. L. HALL,
Of Counsel.

I hereby certify that in my opinion the foregoing petition for rehearing is well founded in point of law.

HIRAM GLASS,
Of Counsel for Plaintiff in Error.

326 *Order Denying Petition for Rehearing.*

DEC. 26, 1911.

No. 2163.

THE TEXAS & PACIFIC RAILWAY COMPANY
vs.
AMERICAN TIE & TIMBER CO., LTD.

Ordered that the petition for rehearing filed in this cause be, and the same is hereby, denied.

Application and Order Staying Mandate.

In the United States Circuit Court of Appeals, Fifth Circuit.

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
AMERICAN TIE & TIMBER COMPANY, LTD., Defendant in Error.

To the Honorable the Judges of the United States Circuit Court of Appeals of the Fifth Circuit:

Comes now the Texas & Pacific Railway Company, through its attorneys, and respectfully shows that this is a cause in which it is entitled to sue out a writ of error to take same to the United States Supreme Court. That it is the purpose of the plaintiff in error, and it will, as speedily as possible, apply for, and obtain, a writ of error from the Chief Justice, or one of the Judges, of the Supreme
327 Court of the United States, to take this cause to said court, and will, within sixty days from the date of the affirmance of the judgment in this cause, file a supersedeas bond to stay process on said judgment, said bond to be conditioned and secured as required by law.

Wherefore Plaintiff in Error respectfully prays your Honors for a stay of the mandate in this cause until January 15th, 1912, pending the application for and procurement of a writ of error, as aforesaid, and the making and filing of supersedeas bond as provided in Section 1007, Revised Stat-es of the United States.

Plaintiff in error will procure the writ and execute and file the bond without unnecessary delay.

T. B. McCORMICK,
HIRAM GLASS,
Attorney- for Plaintiff in Error.

W. L. HALL,
Of Counsel.

I Hiram Glass do solemnly swear that the above application for a stay of mandate is made in good faith and with the bona fide purpose of securing a writ of error to carry this cause to the United States Court, and not for delay only.

HIRAM GLASS.

Sworn to and subscribed before me this the 30th day of December, A. D. 1911.

[SEAL.]

MAX H. BICKLER,
Notary Public, Travis Co., Texas.

The mandate in the above entitled case will be stayed until January 15th, 1912, unless otherwise ordered.

January 3d, 1912.

DON A. PARDEE,
Circuit Judge.

The foregoing has the following indorsements to-wit: No.
328 2163. In U. S. Circuit Court of Appeals, Fifth Circuit. Texas & Pacific Railway Company, Plaintiff in Error, vs. American Tie & Timber Company, Ltd., Defendant in Error. Application for stay of mandate.

Filed 2 day of January, 1912. F. H. Mortimer, Clerk of the United States Circuit Court of Appeals.

Assignment of Errors, etc.

In the Supreme Court of the United States.

At Law.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
AMERICAN TIE & TIMBER COMPANY, LTD., Defendant in Error.

Assignment of Errors and Prayer for Writ of Error.

To the Honorable Judges of the Supreme Court of the United States:

Comes now the Texas & Pacific Railway Company, plaintiff in error, through its attorneys, and respectfully submits to this Honorable Court, that in the record of the proceedings in the above entitled cause, there is and was manifest error committed in The Honorable, the United States Circuit Court of Appeals for the Fifth Circuit, and in the United States Circuit Court, and it respectfully assigns the following errors, to-wit:

First.

The United States Circuit Court of Appeals erred in hold-
329 ing that under the facts and circumstances disclosed by the record, and compatibly with the acts of Congress of the United States to regulate interstate commerce, the Circuit Court had power to consider and decide the subject matters which are complained of and to award the relief prayed for by the defendant in error.

Second.

The United States Circuit Court of Appeals erred in holding that the Circuit Court had jurisdiction and power to determine whether or not railroad cross ties are lumber, the evidence on that issue being conflicting and sufficient to warrant a finding that such cross ties are or are not lumber, because the determination of such issue, under the facts disclosed by the record, was and is primarily and exclusively for the Interstate Commerce Commission.

Third.

The United States Circuit Court of Appeals erred in holding that the Circuit Court had power and jurisdiction to determine the issues

in this cause and award the relief prayed for; and in failing and refusing to hold that where the proper determination of a suit, brought under Section 9 of the Act of Congress to Regulate Commerce, as amended June 29, 1906, is dependent upon the determination of an issue of facts, and where the evidence is conflicting and sufficient to sustain a finding, either in favor of or against such issue, and where the findings of such issue differently would produce different results, and cause a want of uniformity in the construction of tariffs of interstate rates, the determination of such issue is primarily for the Interstate Commerce Commission, and the Circuit Court has no power to determine such issue.

Fourth.

330 The United States Circuit Court of Appeals erred in holding, under the facts disclosed by the record in this cause, that the Circuit Court had the power, under the Interstate Commerce Act, to determine the issues of fact, and award the relief prayed for, because such holding will lead to a want of uniformity in construing and enforcing railroad tariffs of interstate rates.

Fifth.

The United States Circuit Court of Appeals erred in overruling and not sustaining the eleventh assignment of error of plaintiff in error, complaining of the action of the Circuit Court in refusing to instruct the jury to return a verdict for plaintiff in error.

Sixth.

The United States Circuit Court of Appeals erred in affirming the judgment of the Circuit Court awarding damages for the failure of the plaintiff in error to transport railroad oak cross ties from points in Louisiana to a point in Kansas, because plaintiff in error had not published and filed with the Interstate Commerce Commission the rates, fares and charges for the transportation of such cross ties as required by Section 6 of the Act of Congress to Regulate Interstate Commerce, as amended June 29, 1906, and plaintiff in error was therefore prohibited by said Section 6 of the Interstate Commerce Act from transporting, or participating in the transportation of, such cross ties.

Seventh.

The United States Circuit Court of Appeals erred in affirming the judgment of the Circuit Court awarding damages against the plaintiff in error for failure to transport, in interstate commerce, railroad oak cross ties, because, under the facts disclosed by the record in this cause, plaintiff in error was prohibited from transporting, or participating in the transportation of such ties, by Section 6 of the Act of Congress to Regulate Commerce, approved February 11, 1887, as amended June 29, 1906.

331 Eighth.

The United States Circuit Court of Appeals erred in holding that, under the facts disclosed by the record in this cause, it was the duty of plaintiff in error to have transported, in interstate commerce, the railroad oak cross ties of the defendant in error, because the plaintiff in error, under the Act of Congress to Regulate Commerce, approved February 11, 1887, as amended June 29, 1906, could not lawfully transport, or participate in the transportation of such ties.

Ninth.

The United States Circuit Court of Appeals erred in holding that hewn oak railroad cross ties are lumber, and can lawfully be transported under a tariff and schedule of rates for the transportation of lumber.

Tenth.

The United States Circuit Court of Appeals erred in overruling and refusing to sustain the plaintiff in error's eighth assignment of error, complaining of the action of the Circuit Court in refusing to peremptorily instruct the jury to return a verdict for plaintiff in error.

Eleventh.

The United States Circuit Court of Appeals erred in overruling and not sustaining the seventh assignment of error of the plaintiff in error, which is as follows:

"The court erred in not permitting the defendants to introduce the correspondence that passed between its general freight agent, E. L. Sargent, and its local agent, at Fouke, Arkansas, which letters were so *indeitfied* by both of said parties, and tended to show that immediately upon its coming to the knowledge of the head of the freight department, that such agent had shipped ties to interstate points on its lumber tariff, his action was repudiated, and he was instructed to cease such practice, and showed conclusively that it was not
332 the construction of the defendant company that the lumber tariff should apply to ties. The letters referred to are the following three:

"Letter addressed to P. H. Hearn, T. & P. Agent at Fouke, Arkansas, dated August (October) 18, 1907, and signed by general freight agent, asking by what authority said agent was billing oak ties when there was no rate on same.

"Reply letter from P. H. Hearn to E. L. Sargent, dated Fouke, Arkansas, October 20, 1907, stating that said agent has been using lumber rates and T. & P. Tariff No. 10,121-H under head of 'Texas State Traffic,' and asking what rate should be applied on said shipments.

"Reply letter from E. L. Sargent to P. H. Hearn, dated Dallas, Texas, October 22, 1907, advising said agent that Texas tariff rates did not apply on interstate shipments, and for said agent to notify shippers that there were no rates in effect, and that if said shippers

would give the T. & P. Railway Company sufficient notice to publish it would establish a tariff."

Twelfth.

The United States Circuit Court of Appeals erred in holding that the Circuit Court properly refused to submit the issue of whether or not the defendant in error consented to the cancellation of its contract with the Union Pacific Railroad Company, and thereby caused its damages.

Thirteenth.

The United States Circuit Court of Appeals erred in holding that the Circuit Court did not commit error in refusing plaintiff in error's special instruction No. 3, which was as follows:

"Gentlemen of the Jury: If you believe from the evidence that the Union Pacific Railway Company was informed and knew that the plaintiff was unable to, and that it failed to ship and deliver to said railroad 15,000 ties in October and 15,000 during November, 1907; and if you further believe from the evidence that said
333 railroad company did not promptly, on coming into possession of said knowledge, if any, cancel and terminate the contract described in plaintiff's petition and give notice thereof to plaintiff; and if you find from the evidence that on or about December 5, 1907, the plaintiff resumed the shipments and deliveries of ties to said railroad company, and that it was then in a position and able to continue its deliveries of ties, so as to complete the contract within the ten months from October 1, 1907, and if you further find from the evidence that afterwards, with a full knowledge of the foregoing, if you find it had such knowledge, the Union Pacific Railroad recognized and acknowledged the continued existence of said contract, and agreed to still carry out and be bound by the terms thereof, then I charge you that said railroad did not have the legal right to cancel said contract, and if you believe from the evidence that, without further default, knowledge or consent of defendant, the Union Pacific Railroad Company, with or without the consent of plaintiff, cancelled said contract and refused to take and pay for further ties under the same, then I charge you that plaintiff can not recover and you will return a verdict for the defendant."

Because there was evidence sufficient to raise the question as to whether the plaintiff's failure to carry out the contract was due to the failure of the Texas & Pacific Railway Company to transport cross ties in October and November, 1907, or was caused by the wrongful cancellation of the contract by the Union Pacific Railroad Company, or by the improvident consent of the defendant in error to the cancellation of such contract.

Fourteenth.

The United States Circuit Court of Appeals erred in overruling and failing to sustain the twelfth assignment of plaintiff in error, which is as follows:

"The court erred in overruling defendant's requested
334 special instruction No. 4, for the reason last assigned above."

Defendant's requested special instruction No. 4 was as follows:

"Gentlemen of the Jury: You are instructed that unless within the understanding of those engaged in the lumber or railroad traffic business the article of oak railway cross ties comes within the general designation of lumber, you will find your verdict herein for the defendant."

Fifteenth.

The United States Circuit Court of Appeals erred in holding that the Circuit Court did not err in charging the jury as follows:

"The uncontradicted evidence shows that by reason of the defendant's failure and refusal to accept from plaintiff and transport ties called for by plaintiff's contract with the Union Pacific Railway Company, the contract of the plaintiff with that road was breached and not fulfilled by the plaintiff."

Because there was evidence showing and tending to show that the contract with the Union Pacific Railroad Company was breached, not on account of the failure of the Texas & Pacific Railway Company to transport the cross ties, but was wrongfully breached by the Union Pacific Railway Company and acquiesced in by the defendant in error and when it could have lawfully insisted upon its fulfillment.

Sixteenth.

The United States Circuit Court of Appeals erred in holding that the Circuit Court did not err in charging the jury as follows:

"If you believe from the evidence that oak railway cross ties are lumber within the meaning and usage of the lumber and railroad business, then you are charged that the defendant had in effect a rate applying on ties offered for shipment because there was in effect at that time defendant's joint through lumber tariff T. & P. 8500-H, and the plaintiff would be entitled to the damages
335 complained of by it as the consequence of the breaching of its contract for ties with the Union Pacific Railway Company as hereinafter charged you."

Seventeenth.

The United States Circuit Court of Appeals erred in affirming the judgment of the Circuit Court for the full amount of $17,112.23 damages awarded by the verdict of the jury, because said sum and verdict is excessive and awards the sum of $3,530.78 more than the defendant in error was entitled to under the pleadings and evidence and charge of the court, considered in the most favorable light to the defendant in error.

Eighteenth.

United States Circuit Court of Appeals erred in affirming the judgment of the Circuit Court and failing and refusing to perform

the same by reducing the amount of damages awarded by the jury to $13,581.45, that being the greatest amount that the jury, under the charge of the court, the pleadings and the evidence, would have been justified in finding and awarding the defendant in error as its damages.

Nineteenth.

The United States Circuit Court of Appeals erred in affirming the judgment of the Circuit Court awarding the defendant in error the sum of two thousand, five hundred dollars ($2,500) attorneys' fees, because that judgment is not supported or justified by the verdict of the jury, and there is no award of such sum, or any other sum, as attorneys' fees by the jury.

Plaintiff in error shows that it is incorporated under an act of Congress of the United States, that this suit is one arising under the laws of the United States, and the amount of the judgment affirmed is more than $1,000. The judgment was rendered in the
336 United States Circuit Court for the Northern District of Texas, for the sum of $17,112.23 damages, and the further sum of $2,500 Attorneys' fees, which said judgment was, by the United States Circuit Court of Appeals of the Fifth Circuit, affirmed.

Wherefore, the plaintiff in error prays for the allowance of a writ of error to take this cause from the United States Circuit Court of Appeals of the Fifth Circuit to the United States Supreme Court, and for an order fixing the amount of bond for a supersedeas; and that each and all of its assignments of error be considered and sustained, and that the judgment of affirmance by the United States Circuit Court of Appeals for the Fifth Circuit, as well as the judgment of the Circuit Court of the United States for the Northern District of Texas, be reversed, and that judgment be rendered in favor of plaintiff in error, or that said cause be remanded as to this Honorable Court may seem proper.

T. B. McCORMICK,
HIRAM GLASS,
Attorneys for Plaintiff in Error.

W. L. HALL,
Of Counsel.

The above petition is granted and the writ of error allowed. And supersedeas bond fixed at $25,000.00.

JOSEPH R. LAMAR,
Associate Justice Supreme Court of the United States.

Jan. 6, 1912.

The foregoing has the following indorsement to-wit: No. 2163 Texas & Pacific Railway Company, Plaintiff in Error vs. American Tie & Timber Company, Ltd., Defendant in Error. Assignment of Errors and prayer for writ.

Filed 11- day of January, 1912. Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals.

337 UNITED STATES OF AMERICA:

Fifth Judicial Circuit.

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals of the Fifth Circuit, Holding Sessions at New Orleans, Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals, before you, or some of you, between the American Tie & Timber Company, Ltd., Plaintiff, and the Texas & Pacific Railway, Defendant, a manifest error has happened to the great damage of the said Defendant, the Texas & Pacific Railway, as by its complaint appears. The said cause is No. 2163 on the docket of the United States Circuit Court of Appeals, of the Fifth Circuit, and is entitled The Texas & Pacific Railway Company, Plaintiff in Error, versus American Tie & Timber Company, Ltd., Defendant in Error, the same being an error to the United States Circuit Court for the Northern District of Texas, at Dallas. We being willing that error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the Supreme Court to be then and there held, that the record and proceedings afore-
338 said be- inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 6th day of January in the year of our Lord, One Thousand Nine Hundred and twelve.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed, and Supersedeas granted on furnishing bond conditioned as required by law in the sum of $25,000.

JOSEPH R. LAMAR,
Associate Justice Sup. Ct. of the United States.

[Endorsed:] No. 2163. Texas & Pacific Railway Company, Plaintiff in Error, vs. American Tie & Timber Company, Defendant in Error. Writ of Error. Filed 11 day of January, 1912. Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals.

339 It is hereby certified that a copy of this writ is this day lodged in the Clerk's office for the use of defendants in error, 11th day of January, 1912.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER, *Clerk.*

340 *Bond.*

Know all men by these presents, That we, The Texas and Pacific Railway Company, as principal, and the other subscribers hereto, as sureties, are held and firmly bound unto the American Tie and Timber Company, Limited, in the full and just sum of Twenty-five Thousand ($25,000) dollars, to be paid to the said American Tie and Timber Company, Limited, its certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals and dated this 8th day of January, in the year of our Lord one thousand nine hundred and twelve.

Whereas, lately at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, on December 5th, 1911, in a suit depending in said Court, between the Texas and Pacific Railway Company, Plaintiff in error, and American Tie and Timber Company, Limited, Defendant in Error (In U. S. Circuit Court the suit was styled American Tie and Timber Company, Limited, Plaintiff, vs. Texas and Pacific Railway Company, Defendant) a judgment was rendered against the said Texas and Pacific Railway Company, and the said Texas and Pacific Railway Company having obtained Writ of Error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said American Tie and Timber Company, Limited, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said Texas and Pacific Railway Company shall prosecute its said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of:

THE TEXAS AND PACIFIC RAILWAY COMPANY,
By GEO. J. GOULD, *President.* [SEAL.]

341 Attest:

C. E. SATTERLEE, *Secretary.* [SEAL.]
GEO. J. GOULD. [SEAL.]

Approved by:

JOSEPH R. LAMAR,
Associate Justice of the Supreme Court of the United States.

I do solemnly swear that I own property in my own right, exclusive of exemptions, and subject to execution, of the value of more than $25,000.

GEO. J. GOULD.

Sworn to and subscribed before me this 8th day of January, 1912.

[SEAL.] H. L. UTTER,
Notary Public, Kings County.

Certificate filed in New York County.

The foregoing has the following indorsements to-wit: No. 2163. Texas & Pacific Railway Company vs. American Tie & Timber Company. Bond. Filed 11 day of January, 1912. Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals.

342 UNITED STATES OF AMERICA:

The President of the United States to American Tie & Timber Company, Ltd., and their attorneys of record, Rodgers & Dorough, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, thirty days from this date, pursuant to a writ of error, filed in the Clerk's office of the United States Circuit Court of Appeals, for the Fifth Circuit, at New Orleans, Louisiana, wherein the Texas & Pacific Railway is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph R. Lamar, Associate Justice of the Supreme Court of the United States, this the 6 day of January, in the year of our Lord, One Thousand Nine Hundred and twelve.

JOSEPH R. LAMAR,
Associate Justice Supreme Court of the United States.

Receipt of copy of this citation acknowledged and service accepted, waiving nothing but service of writ.

This Jan'y 17th, 1912.

R. W. RODGERS,
Attorney of Record for the American Tie & Timber Co., Ltd.

343 [Endorsed:] No. 2163. Texas & Pacific Railway Company Plaintiff in Error vs. American Tie & Timber Company Ltd. Defendant in Error. Citation. Filed 20th day of January 1912. F. H. Mortimer, Clerk of the United States Circuit Court of Appeals.

344 United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the court (except the transcript of the record from the Circuit Court of the United States for the Northern District of Texas) in a certain cause in said court, numbered 2163, wherein the Texas & Pacific Railway Company is plaintiff in error, and the American Tie & Timber Company, Ltd., is defendant in error, as full, true and complete as the originals of the same now remain on file and of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 22nd day of January A. D. 1912.

[Seal, United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals.

Endorsed on cover: File No. 23,040. U. S. Circuit Court of Appeals, 5th Circuit. Term No. 180. The Texas and Pacific Railway Company, plaintiff in error, vs. American Tie and Timber Company, Limited. Filed February 2, 1912. File No. 23,040.

Office Supreme Court, U. S.
FILED
DEC 20 1913
JAMES D. MAHER
CLERK

No. 180.

Supreme Court of the United States

OCTOBER TERM, 1913.

TEXAS & PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR.

vs.

AMERICAN TIE & TIMBER COMPANY, LTD.,
DEFENDANT IN ERROR.

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR PLAINTIFF IN ERROR.

HIRAM GLASS,
Solicitor for Plaintiff in Error.

W. L. HALL,
Of Counsel.

E. L. STECK, PRINTING, BOOKBINDING, AUSTIN

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LIST OF AUTHORITIES AND CASES CITED IN BRIEF.

Sec. 6 Interstate Commerce Act, June 29, 1906.

B. & O. Co. et al vs. Pitcairn Coal Co. et al, 215 U. S., 481.

T. & P. Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S., 426.

I. C. C. vs. Illinois Cent. Ry. Co., 215 U. S., 452.

Morrisdale Coal Co. vs. Penn. R. R. Co., 230 U. S., —.

Mitchell Coal & Coke Co. vs. Penn. R. R., 230 U. S., ——.

Southern Railway vs. Reid, 222 U. S., 424.

A. C. L. Ry. Co. vs. Macon Grocery Co., 166 Fed., 206.

Smith vs. Detroit, etc., Ry., 175 Fed., 506.

C. I. & S. Co. vs. K. & M. Ry., 178 Fed., 261.

Franklin vs. Penn. R. R. Co., 203 Fed., 134.

Pacific Coast B. Co. vs. Railroad, 20 I. C. C. Rep., 546.

U. S. vs. Ill. Terminal Ry. Co., 168 Fed., 548.

So. Pacific Ry. Co. vs. I. C. C., 200 U. S., 552.

Howard Supply Co. vs. C. & O. R. R., 162 Fed., 188.

Greason et al vs. St. L. I. M. & S. Ry. Co., 86 S. W., 722.

Armour Packing Co. vs. United States, 209 U. S., 56.

Mugg & Dryden vs. T. & P. Ry. Co., 202 U. S., 242.

K. C. B. & N. Co., 149 Fed. Rep., 360.

Beck vs. Pauli, etc., & Co., 52 Fed., 700.

Shouse vs. Doane, 21 So. Rep., 807.

Lapsley vs. Howard, 119 Mo., 489.

No. 180.

Supreme Court of the United States

OCTOBER TERM, 1913.

TEXAS & PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR.

vs.

AMERICAN TIE & TIMBER COMPANY, LTD.,
DEFENDANT IN ERROR.

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR PLAINTIFF IN ERROR.

This suit against the plaintiff in error, and a similar one against the Kansas City Southern Railway Company, were filed in the United States Circuit Court for the Northern District of Texas by the de-

fendant in error. The causes were consolidated, subject to the plea to the jurisdiction of the Court by the Kansas City Southern Railway Company, which plea was afterwards sustained and the cause as to that company dismissed.

The defendant in error claimed damages against the plaintiff in error on account of its failure and refusal to accept and transport certain oak railroad cross ties, on the lumber rate, from the States of Louisiana and Arkansas to Linwood in the State of Kansas over its own and connecting lines of railroad, during the months of September, October and November, 1907. It was alleged that the defendant in error, but for such failure and refusal, would have shipped over the Texas & Pacific Railway Company, and connecting carriers, from points in Louisiana and Arkansas to Linwood in the State of Kansas approximately 60,000 railroad cross ties not less than eight feet nor more than eight feet and one inch in length, with the end sawed or cut square, all bark taken off, hewn or sawed on two parallel sides to straight smooth surface on sides, and not less than six inches thick between parallel faces, and the faces not less than eight inches wide. Said cross ties to be made of white-oak, burr-oak and post-oak. It was alleged that approximately 45,000 of these oak cross ties had been placed on the right-of-way of the plaintiff in error for shipment, and the damages on account of the failure to ship them was laid at the difference between what the defendant in error would have received for the ties, less the freight, and what it did receive for them at a later period. The damages for failure to ship about 15,000 ties that were not placed on the road was laid at the profit it was claimed defendant in error would have made on such ties.

It was not claimed or alleged that the plaintiff in error had on file with the Interstate Commerce Commission any tariff or schedule of rates specifically applying to railroad cross ties; the only allegation on that subject being made by the defendant in error was that the plaintiff in error had on file with the Interstate Commerce Commission a joint through lumber tariff, T. & P. No. 8500 H, naming a rate of 24 cents per hundred weights applying on lumber, all kinds, including oak lumber, from points on its line of railroad in Louisiana and Arkansas, and over connecting lines, to Linwood, Kansas. (Rec., pp. 2 and 3.) And it was further alleged that oak cross ties were lumber. (Rec., p. 6.)

Plaintiff in error answered by general denial, and specially that it had no tariff or schedule of rates on railroad oak cross ties on file with the Interstate Commerce Commission in September, October and November, 1907, and that its through lumber tariff, T. & P. No. 8500 H, was a commodity tariff, and that the rates therein specified applied only on lumber and a list of the articles named therein taking the same rate, and that oak cross ties were not named in said lumber tariff, and that it could not, under Section Six of the Interstate Commerce Act, effective August 29th, 1907, legally transport or participate in the transportation of the oak cross ties mentioned in the petition of the defendant in error. That railroad cross ties were, and are, a separate and distinct and well-recognized freight commodity. That no joint through rates over its line of railroad and connecting carriers to interstate points had been published and filed with the Interstate Commerce Commission, as required by law, and that it refused to transport said cross ties until such tariff could be

promulgated, published and filed with the Interstate Commerce Commission.

It was further alleged that the first notice it had of the desire of defendant in error to ship oak cross ties over its line of road and connecting carriers to interstate points, was on September 24th, 1907, when it explained to the defendant in error that it had no tariff of rates on oak cross ties from points on its line of railroad and connecting carriers to Linwood, Kansas, but it offered to put in a rate of fifty cents per hundred weight. That defendant in error informally complained to the Interstate Commerce Commission that the proposed rate was too high, and after certain correspondence between the plaintiff in error and the Interstate Commerce Commission, plaintiff in error sought permission to put in a rate of twenty-four cents per hundred weight on railroad oak cross ties from points on its line of railroad in Louisiana and Arkansas and connecting carriers to Linwood, Kansas, effective at once. That the Interstate Commerce Commission refused to allow said tariffs to be filed, effective less than the statutory period of thirty days. (Rec., pp. 13-15.)

The tender of the shipment of the cross ties forming the basis of this suit was made a few months after the Hepburn Act of 1906 became effective, which Act, by Section Six, for the first time, made it a penal offense for any common carrier to engage, or participate, in the transportation of any property unless the rates, fares and charges upon the same so transported shall have been filed and published in accordance with the provisions of the Act. The Hepburn Act also conferred upon the Interstate Commerce Commission the authority to prescribe the

kind and character of tariffs and schedules that should be filed by it; and in pursuance of that authority, the Interstate Commerce Commission did issue its Circular Tariff 14-a, effective June, 1907, directing how the tariffs and schedules should be made up, in which the following order, among others, appeared:

"6. The term 'common points' shall not be used in any tariff for the purpose of indicating the points from or to which rates named therein apply unless a full list of such points is printed in the tariff or specific reference is given to the I. C. C. number of the issue that contains such list. The term 'grain products,' 'forest products,' 'petroleum and its products,' 'cottonseed products,' or similar terms must not be used in any tariff for the purpose of indicating the articles to which the rates apply, unless a full list of articles intended to be included in and covered by such terms is printed in the tariff or specific reference is given to I. C. C. number of issue that contains such list.

"Commodity rates must be specific and must not be applied to analogous articles."

The trial Court made defendant in error's right to recover depend upon whether or not oak cross ties were, as a matter of fact, lumber, and charged the jury as follows:

"Under the pleadings and evidence in this case the liability of the defendant to plaintiff for damages suffered by the latter because of the breach of its contract with the Union Pacific Railway Company for the sale and purchase of

the oak railway cross ties, depends upon whether or not at the time plaintiff offered its ties for transportation, the defendant had in effect a rate under which it could lawfully transport them.

"If you find that it did have in effect such a rate, then the defendant's refusal to accept the ties from plaintiff for shipment was wrongful and the plaintiff would be entitled to recover damages suffered by it by reason of the breaching of the contract as hereinafter charged. If you find the defendant did not have in effect such a rate, then the defendant could not lawfully ship the ties over it and your verdict should be for the defendant.

"In reaching your conclusion as to whether the defendant did or did not have in effect a rate covering the oak ties offered for shipment, you are called upon to determine whether or not such ties are lumber within the meaning and usage of the lumber and railroad business.

"If you believe from the evidence that oak railway cross ties are lumber within the meaning and usage of the lumber and railroad business, then you are charged the defendant had in effect a rate applying on the ties offered for shipment, because there was in effect at that time defendant's Joint Through Lumber Tariff, T. & P. 8500-H, and the plaintiff would be entitled to the damages complained of by it as a consequence of the breaching of its contract for ties with the Union Pacific Railway Company as hereinafter charged you.

"If you fail to find from the evidence that oak railway cross ties are lumber within the mean-

ing and usage of the lumber and railroad business, your verdict will be for the defendant." (Rec., pp. 220-221.)

The evidence as to whether or not railroad cross ties are, or were, lumber within the meaning and usage of the lumber and railroad business was conflicting. The great weight of the evidence, however, being that such cross ties were not lumber, within the meaning or usage of the lumber and railroad business, but that on the contrary, railroad cross ties were a distinct and separate commodity from lumber, and that all railroads classified cross ties as separate and distinct from lumber.

The most that can be claimed by the defendant in error is that there was some evidence tending to show that railroad cross ties were lumber within the meaning and usage of the railroad and lumber business, sufficient to authorize the jury to find in its favor on that issue.

Plaintiff in error, however, claimed that the Circuit Court was not authorized to determine an issue of that kind, but that it must, in the first instance, be determined by the Interstate Commerce Commission, and therefore made the following motion, which was refused:

"Now comes the defendant, after the close of the testimony, and moves the Court to dismiss this cause without prejudice, because under the facts and circumstances now disclosed by the record, and compatably with the Act of Congress of the United States to regulate interstate commerce, this Court has no power to consider and decide the subject matters which are complained

of, or to award the relief prayed for by plaintiff." (Rec., p. 219.)

The action of the trial Court in denying this motion was assigned as error in the Circuit Court of Appeals. (Rec., p. 228.)

Plaintiff in error requested the trial Court to direct a verdict in its favor, because at the times the cross ties were tendered to it for shipment, there was no tariff of rates, fares, and charges upon which the same could be transported on file with the Interstate Commerce Commission, as required by Section Six of the Hepburn Act. (Rec., p. 223.) The failure of the Court to give the requested charges was assigned as error in the Circuit Court of Appeals. (Rec., p. 230.)

On the trial the plaintiff in error contended that under the evidence, the Union Pacific Railway Company had wrongfully cancelled and breached its contract with the defendant in error after its right to do so had been waived, and the defendant in error was in a position to, and was, in fact, carrying out its contract, and therefore asked the Court to charge the jury, in effect, that if they found that to be true, to find in favor of the railway company. (Rec., p. 225.) Said charge was refused. This charge, as well as all the requested charges, was requested after the Court had announced that he would submit for the jury to find whether or not cross ties are lumber.

The refusal of the Court to give all and each of the special charges was excepted to in open Court.(Rec., p. 223.)

Defendant in error sued for a reasonable attorney's fee, alleged to be $5,000. (Rec., p. 9.) No evidence as to what would be a reasonable fee was in-

troduced, and the amount of the fee was not submitted for the determination of the jury.

The trial Court, however, in its final judgment awarded defendant in error the sum of $2,500, to be taxed as part of the costs and included in the execution. (Rec., p. 18-19.) The action of the Court in allowing attorneys' fees was assigned as error in the Circuit Court of Appeals. (Rec., p. 235.)

The jury returned a verdict in favor of defendant in error for $17,112.23, and judgment was regularly entered thereon, which judgment recited the fact that the plaintiff in error presented a motion to dismiss the cause without prejudice for the reason that the case as developed was one of which the Interstate Commerce Commission alone should take cognizance, and over which the Circuit Court of the United States could not rightfully exercise its jurisdiction. Also recited that the motion was overruled, and the plaintiff in error excepted. Rec., p. 17-18.) It is also claimed the verdict and judgment, under the pleadings, could not legally exceed $13,581.45.

The plaintiff in error, in due time, perfected its writ of error to the Circuit Court of Appeals of the Fifth Circuit, and all of the errors assigned in this Court were assigned and urged in that Court. (Rec., pp. 228-235.)

On December 5th, 1911, the Circuit Court of Appeals rendered its opinion, sustaining the jurisdiction and power of the Circuit Court to hear and determine the issues under the record as made, overruled all the assignments of error and affirmed the judgment of the Circuit Court. (Rec., p. 239.)

Within the time allowed by law, a petition for rehearing was filed in said Circuit Court of Appeals.

(Rec., p. 240-245.) And on December 26th, 1912, the petition for rehearing was denied.

In due time plaintiff in error sued out a writ of error to this Court and executed the bond required by the Court and had the writ of error issued and service of same was accepted by defendant in error. (Rec., pp. 253-255.)

SPECIFICATIONS OF ERRORS.

The Following assignment of errors with prayer for writ of error was filed in this Court, and are now urged and relied upon:

First.

The United States Circuit Court of Appeals erred in holding that under the facts and circumstances disclosed by the record, and compatibly with the acts of Congress of the United States to regulate interstate commerce, the Circuit Court had no power to consider and decide the subject matters which are complained of and to award the relief prayed for by the defendant in error.

Second.

The United States Circuit Court of Appeals erred in holding that the Circuit Court had jurisdiction and power to determine whether or not railroad cross ties are lumber, the evidence on that issue being conflicting and sufficient to warrant a finding that such cross ties are, or were not lumber, because the determination of such issue, under the facts disclosed

by the record, was and is primarily and exclusively for the Interstate Commerce Commission.

Third.

The United States Circuit Court of Appeals erred in holding that the Circuit Court had power and jurisdiction to determine the issues in this cause and award the relief prayed for; and in failing and refusing to hold that where the proper determination of a suit, brought under Section 9 of the Act of Congress to Regulate Commerce, as amended June 29, 1906, is dependent upon the determination of an issue of facts, and where the evidence is conflicting and sufficient to sustain a finding, either in favor of or against such issue, and where the findings of such issue differently would produce different results, and cause a want of uniformity in the construction of tariffs of interstate rates, the determination of such issue is primarily for the Interstate Commerce Commission, and the Circuit Court has no power to determine such issue.

Fourth.

The United States Circuit Court of Appeals erred in holding, under the facts disclosed by the record in this cause, that the Circuit Court had the power, under the Interstate Commerce Act, to determine the issues of fact, and award the relief prayed for, because such holding will lead to a want of uniformity in construing and enforcing railroad tariffs of interstate rates.

Fifth.

The United States Circuit Court of Appeals erred in overruling and not sustaining the eleventh assignment of error of plaintiff in error, complaining of the action of the Circuit Court in refusing to instruct the jury to return a verdict for plaintiff in error.

Sixth.

The United States Circuit Court of Appeals erred in affirming the judgment of the Circuit Court awarding damages for the failure of the plaintiff in error to transport railroad oak cross ties from points in Louisiana to a point in Kansas, because plaintiff in error had not published and filed with the Interstate Commerce Commission the rates, fares and charges for the transportation of such cross ties as required by Section 6 of the Act of Congress to Regulate Commerce, as amended June 29, 1906, and plaintiff in error was therefore prohibited by said Section 6 of the Interstate Commerce Act from transporting, or participating in the transportation of, such cross ties.

Seventh.

The United States Circuit Court of Appeals erred in affirming the judgment of the Circuit Court awarding damages against the plaintiff in error for failure to transport, in interstate commerce, railroad oak cross ties, because, under the facts disclosed by the record in this cause, plaintiff in error was prohibited from transporting, or participating in the transportation of such ties, by Section 6 of the Act of Con-

gress to Regulate Commerce, approved February 11, 1887, as amended June 29, 1906.

Eighth.

The United States Circuit Court of Appeals erred in holding that, under the facts disclosed by the record in this cause, it was the duty of plaintiff in error to have transported, in interstate commerce, the railroad oak cross ties of the defendant in error, because the plaintiff in error, under the Act of Congress to Regulate Commerce, approved February 11, 1887, as amended June 29, 1906, could not lawfully transport, or participate in the transportation of such ties.

Ninth.

The United States Circuit Court of Appeals erred in holding that hewn oak railroad ties are lumber, and can lawfully be transported under a tariff and schedule of rates for the transportation of lumber.

Tenth.

The United States Circuit Court of Appeals erred in overruling and refusing to sustain the plaintiff in error's eighth assignment of error, complaining of the action of the Circuit Court in refusing to peremptorily instruct the jury to return a verdict for plaintiff in error.

Eleventh.

The United States Circuit Court of Appeals erred in overruling and not sustaining the seventh assiga-

ment of error of the plaintiff in error, which is as follows:

'The Court erred in not permitting the defendants to introduce the correspondence that passed between its general freight agent, E. L. Sargent, and its local agent, at Fouke, Arkansas, which letters were so identified by both of said parties, and tended to show that immediately upon its coming to the knowledge of the head of the freight department, that such agent had shipped ties to interstate points on its lumber tariff, his action was repudiated, and he was instructed to cease such practice, and showed conclusively that it was not the construction of the defendant company that the lumber tariff should apply to ties. The letters referred to are the following three:

'Letter addressed to P. H. Hearn, T. & P. Agent at Fouke, Arkansas, dated August (October) 18, 1907, and signed by general freight agent, asking by what authority said agent was billing oak ties when there was no rate on same.

'Reply letter from P. H. Hearn to E. L. Sargent, dated Fouke, Arkansas, October 20, 1907, stating that said agent has been using lumber rates and T. & P. Tariff No. 10, 121-H under head of 'Texas State Traffic,' and asking what rate should be applied on said shipments.

'Reply letter from E. L. Sargent to P. H. Hearn, dated Dallas, Texas, October 22, 1907, advising said agent that Texas tariff rates did

not apply on interstate shipments, and for said agent to notify shippers that there were no rates in effect, and that if said shippers would give the T. & P. Railway Company sufficient notice to publish it would establish a tariff.'

Twelfth.

The United States Circuit Court of Appeals erred in holding that the Circuit Court properly refused to submit the issue of whether or not the defendant in error consented to the cancellation of its contract with the Union Pacific Railroad Company, and thereby caused its damages.

Thirteenth.

The United States Circuit Court of Appeals erred in holding that the Circuit Court did not commit error in refusing plaintiff in error's special instruction No. 3, which was as follows:

'Gentlemen of the Jury: If you believe from the evidence that the Union Pacific Railway Company was informed and knew that the plaintiff was unable to, and that it failed to ship and deliver to said railroad 15,000 ties in October and 15,000 during November, 1907; and if you further believe from the evidence that said railroad company did not promptly, on coming into possession of said knowledge, if any, cancel and terminate the contract described in plaintiff's petition and give notice thereof to plaintiff; and if you find from the evidence that on or about December 5, 1907, the plaintiff resumed the ship-

ments and deliveries of ties to said railroad company, and that it was then in a position and able to continue its deliveries of ties, so as to complete the contract within the ten months from October 1, 1907, and if you further find from the evidence that afterwards, with a full knowledge of the foregoing, if you find it had such knowledge, the Union Pacific Railroad recognized and acknowledged the continued existence of said contract, and agreed to still carry out and be bound by the terms thereof, then I charge you that said railroad did not have the legal right to cancel said contract, and if you believe from the evidence that, without further default, knowledge or consent of defendant, the Union Pacific Railroad Company, with or without the consent of plaintiff cancelled said contract and refused to take and pay for further ties under the same, then I charge you that plaintiff cannot recover and you will return a verdict for the defendant.'

Because there was evidence sufficient to raise the question as to whether the plaintiff's failure to carry out the contract was due to the failure of the Texas & Pacific Railway Company to transport cross ties in October and November, 1907, or was caused by the wrongful cancellation of the contract by the Union Pacific Railroad Company, or by the improvident consent of the defendant in error to the cancellation of such contract.

Fourteenth.

The United States Circuit Court of Appeals erred in overruling and failing to sustain the twelfth assignment of plaintiff in error, which is as follows:

'The Court erred in overruling defendant's requested special instruction No. 4, for the reason last assigned above.'

Defendant's requested special instruction No. 4 was as follows:

'Gentlemen of the Jury: You are instructed that unless within the understanding of those engaged in the lumber or railroad traffic business the article of oak railway cross ties comes within the general designation of lumber, you will find your verdict herein for the defendant.'

Fifteenth.

The United States Circuit Court of Appeals erred in holding that the Circuit Court did not err in charging the jury as follows:

'The uncontradicted evidence shows that by reason of the defendant's failure and refusal to accept from plaintiff and transport ties called for by plaintiff's contract with the Union Pacific Railway Company, the contract of the plaintiff with that road was breached and not fulfilled by the plaintiff.'

Because there was evidence showing and tending to show that the contract with the Union Pacific Railroad Company was breached, not on account of the failure of the Texas & Pacific Railway Company to transport the cross ties, but was wrongfully breached by the Union Pacific Railway Company and acquiesced in by the defendant in error and

when it could have lawfully insisted upon its fulfillment.

Sixteenth.

The United States Circuit Court of Appeals erred in holding that the Circuit Court did not err in charging the jury as follows:

> 'If you believe from the evidence that oak railway cross ties are lumber within the meaning and usage of the lumber and railroad business, then you are charged that the defendant had in effect a rate applying on ties offered for shipment because there was in effect at that time defendant's joint through lumber tariff T. & P. 8500-H, and the plaintiff would be entitled to the damages complained of by it as the consequence of the breaching of its contract for ties with the Union Pacific Railway Company as hereinafter charged you.'

Seventeenth.

The United States Circuit Court of Appeals erred in affirming the judgment of the Circuit Court for the full amount of $17,112.23 damages awarded by the verdict of the jury, because said sum and verdict is excessive and awards the sum of $3,530.78 more than the defendant in error was entitled to under the pleadings and evidence and charge of the Court, considered in the most favorable light to the defendant in error.

Eighteenth.

United States Circuit Court of Appeals erred in affirming the judgment of the Circuit Court and failing and refusing to preform the same by reducing the amount of damages awarded by the jury to $13,581.45, that being the greatest amount that the jury, under the charge of the Court, the pleadings and the evidence, would have been justified in finding and awarding the defendant in error as its damages.

Nineteenth.

The United States Circuit Court of Appeals erred in affirming the judgment of the Circuit Court awarding the defendant in error the sum of two thousand, five hundred dollars ($2,500) attorneys' fees, because that judgment is not supported or justified by the verdict of the jury, and there is no award of such sum, or any other sum, as attorneys' fees by the jury.

Plaintiff in error shows that it is incorporated under an act of Congress of the United States, that this suit is one arising under the laws of the United States, and the amount of the judgment affirmed is more than $1,000. The judgment was rendered in the United States Circuit Court for the Northern District of Texas, for the sum of $17,112.23 damages, and the further sum of $2,500 attorneys' fees, which said judgment was, by the United States Circuit Court of Appeals of the Fifth Circuit, affirmed."

ARGUMENT.

In determining whether certain rates shown in tariffs on file with the Interstate Commerce Commission must be applied to certain commodities moving from one state to another, where under the pleadings and the evidence that question may be determined by one Court one way and by the Interstate Commerce Commission or another Court a different way, thereby bringing about a want of uniformity in the meaning and construction of railroad interstate tariffs, and in the application of rates named in such tariffs, the question must, in the first instance, be determined by the Interstate Commerce Commission, and the Circuit Courts cannot, compatibly with the Interstate Commerce Act, consider and decide such question or award the relief that is dependent upon a correct decision of such question of fact.

The overwhelming weight of the evidence, introduced on the trial, shows that in lumber and railroad business, railroad cross ties are not regarded or treated as lumber, and are, in fact, not lumber within the meaning of that term. All that can be said in favor of the verdict of the jury, is that there was some evidence, consisting mostly of what the plaintiff in error did with reference to the shipment of cross ties prior to the Hepburn Act, effective August 29th, 1906, tending to show that railroad cross ties are lumber within the meaning and usage of lumber and railroad business. The evidence was, however, abundantly and overwhelmingly sufficient to support the negative proposition, that is, that railroad cross ties are not lumber within the meaning of lumber and railroad business. Under the charge of the Court and the evidence introduced, a verdict in favor of the plaintiff

in error, that railroad cross ties are not lumber within the meaning and usage of lumber and railroad business, would have been abundantly and overwhelmingly sustained.

In the trial of another case on an exactly similar record, a jury might properly, and in all probability would, decide that issue in favor of the railroad and against the complainant. The result, therefore, would be a want of, and, in fact, an absence of uniformity in the meaning, construction and application of interstate tariffs of rates, which result could not occur if the determination of the question was primarily submitted to the Interstate Commerce Commission.

In this connection it is well to remember that this suit is based solely on the proposition that railroad cross ties are lumber. The judgment cannot be sustained on any other theory. It cannot be sustained on the theory that the ties should have been transported and the sum of the local rates collected, because there is no allegation or proof that there was such local rates, nor what were such rates. As the rates had to be deducted in order to determine the amount of damage to be awarded it is manifestly clear that there was no basis for recovery, except on the theory that oak railroad cross ties are in fact lumber; and that railroads may lawfully refrain from filing tariffs or schedules of rates for transporting cross ties, provided they file a tariff and schedule of rates on analogous articles, such as lumber, railroad supplies, etc.

STATEMENT OF EVIDENCE.

Section Six of Circular 14-a, effective January, 1907, directing how the tariffs should be formed and made up, issued and promulgated by the Interstate Commerce Commission, was introduced in evidence as follows:

"6. The term 'common points' shall not be used in any tariff for the purpose of indicating the points from or to which rates named therein apply unless a full list of such points is printed in the tariff or specific reference is given to the I. C. C. number of the issue that contains such list. The term 'grain products,' 'forest products,' 'petroleum and its products,' 'cottonseed products,' or similar terms must not be used in any tariff for the purpose of indicating the articles to which the rates apply, unless a full list of articles intended to be included in and covered by such terms is printed in the tariff or specific reference is given to I. C. C. number of issue that contains such list.

"Commodity rates must be specific and must not be applied to analogous articles." (Rec., p. 127.)

W. F. Sterley, a witness for the defendant in error, testified as follows:

Q. I will ask you to state whether or not the Fort Worth and Denver handles cross ties upon lumber tariff rates?

A. Without being specified, we do not.

Q. Don't you accept when tendered to you by other roads any lumber billed?

A. Not unless the tariff so specifies.

Q. Not unless the tariff so specifies. Don't you accept them if billed to you by another road—another carrier, under the lumber tariff? Don't you carry them just the same?

A. If they are included—incorporated among the items taking lumber rates or described as lumber in tariff, then we treat them as lumber or rather we treat them as cross-ties, but carry them on lumber rates.

Q. Your road handled some cross ties—long in 1907, going to Colorado Midland, Colorado City and Forth Worth and Denver, they were handled under a lumber rate then in force, were they not?

A. I cannot say. This (referring to way-bill) does not indicate what the through rate was or what the tariff rate was; this is simply the proportion accruing to the Texas and Pacific up to Fort Worth.

Q. Well, didn't you know at that time that the Texas and Pacific had no rate in effect specifying cross ties, nothing but a joint lumber rate?

A. I did not.

Q. Then, you don't testify that your company would not handle them unless it was in the rate sheet?

A. I testify that unless it was in the rate sheet that cross ties would not be treated as lumber. (Rec., p. 79-80.)

On cross-examination by Mr. McCormick for the railway, witness testified:

Q. If there is a tariff—I mean in view of your experience in construing tariffs, if you had submitted to you such a tariff as this Texas and Pacific Joint Lumber Tariff, which covers lumber, all kinds, except those three kinds and valuable woods, and does

not specifically include hewn or sawn oak railway cross ties, would you consider that those articles come within that tariff?

A. No.

Q. What did you say about it?

A. I said no. I would not.

Question by Mr. Rogers for the tie company: Would you accept a shipment where the rate on cross ties being specified as a commodity, was a higher rate than the rate on lumber?

A. We would accept it under that commodity rate, yes.

Q. Ship and transport it?

A. Yes.

Q. Would you accept a rate on ties as a specific commodity if it was lower than the rate on lumber?

A. If we had a lower rate published or a rate published on a specific commodity, we certainly would accept it.

Q. Do you sometimes make a rate on ties higher than the lumber rate?

A. Not that I know of.

Q. Do you make them lower?

A. I have known them to be lower for many years.

Q. You don't make them higher?

A. I don't recollect a case.

Q. Oak lumber rates and oak tie rates are the same?

A. No; not necessarily.

Q. What are they—which one is the highest?

A. Oak is usually higher—

Q. Oak lumber rate and oak tie rate is the same, is it not?

A. Not unless you specify it; unless you specify oak ties in the tariff providing rates on oak lumber,

I should not apply oak ties any more than I would on wagon axles or hounds in the rough.

Q. You apply it on any other kind of oak lumber, would you not? You ordinarily apply the oak lumber rate on any kind of lumber?

A. Yes; a commodity regarded by the trade as lumber is lumber. (Rec., p. 83.)

The following correspondence with the Interstate Commerce Commission was introduced. A letter from the American Tie & Timber Company to the Interstate Commerce Commission, dated September 30th, 1907, as follows:

"Shreveport, La., Sept. 30, 1907.

Hon. Secretary, Interstate Commerce Commission, Washington, D. C.

Dear Sir:—

We are enclosing you copy of our letter of Sept. 24, 1907, to Mr. E. L. Sargent, General Freight Agent, of the Texas & Pacific Ry Co., at Dallas, Texas, in which we request him to quote us rates on oak railway cross ties to interstate points: Mr. Sargent has not answered this letter, but the Commercial Agent of the Texas & Pacific Ry. Co., Mr. H. S. Hinton, who is located in Shreveport, told our manager that he had received a letter from Mr. Sargent, instructing him to notify us that the Texas & Pacific Ry. Co. did not have any published rate on oak cross ties between the points mentioned in our letter, but, that if we would give notice in time to allow them to publish a rate that they may make one of 50c per cwt. from the points mentioned in

Louisiana and Abilene, Texas, El Paso, Texas, Kansas City, Mo., and Junction City, Kansas, and a rate of 75c per cwt. to the other points named in our letter. We now have on file in our office a tariff published by the Texas & Pacific Ry. Co. which reads as follows: 'Joint Through Lumber Tariff' T. & P. No. 8500-H, applying on lumber all kinds (except walnut and cherry) lath and shingles and articles taking same rates. Then refers to a list of forest products (2) which covers nearly everything except cross ties.

We take the position that the Texas & Pacific's reply through the medium of their commercial agent in person, who we requested to give us an answer in writing, but up to the present time we have not received, is an unjust discrimination against our product, and one if enforced will deprive us of transportation at a reasonable rate.

We now have on the line of the Texas & Pacific Ry. between 50 and 75 car loads of oak cross ties, which we desire to ship to interstate points, and if we are delayed in moving them it will cause us a severe loss. We request your ruling at the earliest convenient date.

Yours very truly,

AMERICAN TIE & TIMBER CO., LIMITED.
(Rec., p. 99). By J. J. Marshall, Manager."

Also the following letter from the General Freight Agent of the Plaintiff in Error to the Interstate Commerce Commission:

"Dallas, Texas, Oct. 11, 1907.

File 2-B

Authority No. 105491.

To the Honorable the Interstate Commerce Commission, Washington, D. C.

Gentlemen:—

This will serve to acknowledge receipt of Commissioner Cockrell's letter of October 7th, enclosing copy of communication from Manager Marshall of the American Tie & Timber Company, Limited, dated Shreveport, La., September 30th, in which informal complaint is made of the rates we have quoted on oak cross ties from certain points on our line in Louisiana to Kansas City and several other points mentioned in their letter.

The situation, from our point of view, has been explained to the Commission on a previous occasion, and we attach for convenient reference, copy of our letter of August 19th, addressed to Secretary Moseley, setting forth certain facts, which in our opinion, has a material bearing on the situation. In reply to our letter, Mr. Moseley wrote us under date of August 26th, suggesting that we add gum, cottonwood and willow ties to our lumber tariff No. 8500-H. This has been done in Supplement No. 170 to that issue (Supplement No. 168 to I. C. C. No. 792, copy herewith enclosed for ready reference) and we are in hopes that this addition will result in relieving the situation, in so far as points named in that tariff are concerned.

In so far as Mr. Marshall's complaint is concerned, will state that we have a further letter

from our Commercial Agent at Shreveport, dated October 4th, stating that Mr. Marshall has again advised him that his company is not interested in through rate, as under his contract with the Union Pacific Railroad Company, to which company he has sold the ties, the Union Pacific pays the freight. We, therefore, assume, that in complaining of the present adjustment, Mr. Marshall is acting for others and not his own company.

Under existing conditions, as explained in our letter of August 19th, we hope that the Commission will decide that no further change should be made in the tariff.

Yours truly,

.....,

(Rec., p. 100.) General Freight Agent."

Also the following reply from Hon. F. M. Cockrell, one of the Interstate Commerce Commissioners:

"November 14, 1907.

Mr. E. L. Sargent, General Freight Agent, Texas & Pacific Railway Company, Dallas, Texas.

Dear Sir:

Your favor of October 11, File 2-B, Authority No. 105,491, addressed to this Commission, in reply to my letter of October 7, enclosing a communication from Manager Marshall of the American Tie & Timber Company, complaining of rate on oak cross ties from points on your line in Louisiana to Kansas City, and several other points, was duly received and a copy was sent to the American Tie & Timber Company on October 28.

The Commission has received the reply of this complaining company, dated the 6th instant, in which they refer to your letter and say:

'The substance of his appeal is to deny our company just and reasonable rates on a commodity, the price of which, he, in the interest of his road, seeks to drive down and keep down by legally eliminating competition.'

They further say that your explanation as to why the rate on oak and cypress ties should not be the same as lumber, is inconsistent and they furnish a long list of articles that have the same rate as lumber including staves, heads and hoops.

They also say:

'The very best cypress and oak tie timber is used in making these articles, and if it were not for the discrimination in favor of the stave men, a great deal of this timber would be made into cross ties and as fully 50 per cent of the staves are shipped to Europe, and are manufactured by foreign labor, to use the timber for cross ties would keep the timber at home where it is needed and keep our trunk lines of railroad in repair.'

They say it is not fair for the Texas & Pacific Railway Company to employ the methods you indicate. They further state:

'The facts are that for a long time they have purchased their ties in this section from one contractor, and by their excessive rates have made it impossible for any other person to handle any oak or cypress ties, and any one owning oak or cypress ties or timber, have been forced to sell to their contractor or not at all, which practically gave him a monopoly of the tie business of this

class on the Texas & Pacific Railway, and they are still discriminating in favor of this contractor, for in the past few weeks he has shipped off the line of the Texas & Pacific Railway, which shows that he is doing other business besides what he is doing for the Texas & Pacific Railway, and he travels in Louisiana over their road on a pass.'

They further say: 'He advises you in his letter of Oct. 11th, that he has a letter from their Commercial Agent at Shreveport, under date of Oct. 4th, stating that Mr. Marshall has again advised them that this company is not interested in the through rate, as under his contract with the Union Pacific Company to which company he has sold ties, the Union Pacific pays the freight.

If their Commercial Agent wrote them this, he is mistaken as to his understanding of his conversation with Mr. Marshall, as it was not his intention to leave any such impression, as it would be false, for the fact is that the ties are sold at a delivered price, and we are very much interested in the through rate, and are not working in the interest of any one except ourselves.

Please advise the Commission fully in the premises and as to what course you propose to pursue in this case, and whether you can afford any relief.

Yours truly,

F. M. COCKRELL,
Commissioner."

(Rec., p. 101-102.)

Also the following letter from the General Freight Agent of the Plaintiff in Error in reply to the one above:

Dallas, Texas, November 18, 1907.

To the Honorable the Interstate Commerce Commission, Washington, D. C.

Dear Sir:

This company is in receipt of a communication signed by the Honorable F. M. Cockrell, Commissioner, in reference to a communication received by the Commission from Manager Marshall of the American Tie & Timber Company, complaining of rates on oak ties from points on our line to Kansas City and other points.

We have treated the subject very exhaustively on a number of previous occasions, and we thought we had outlined our position so that it would be considered a very reasonable one, all the circumstances being taken into consideration.

In regard to the labor in preparing cross ties as against staves and headings, it is my belief that there is at least three times the amount of labor expended in the manufacture of staves and heading—as there is on cross ties, which I believe would be proven if investigated by experts of the government.

As far as the purchase of ties from one contractor is concerned, if an investigation was set on foot, it could be conclusively shown that the price of ties made to this company by Mr. Signor, who is undoubtedly the alleged favored contractor referred to, are so much more reasonable than the prices of any other concern that have ever offered us any ties of a similar description, that any further argument on the subject would fall to the ground. We think it is no discrimination for any company to buy in the cheapest market.

The only oak ties that have been shipped off of the Texas & Pacific Railway by this contractor that we have been able to learn anything about, went to the Missouri Pacific Railway at Alexandria and one of the members of this system. Inasmuch as the freight rate assessed on these ties, for points averaging less than one hundred miles, was thirty cents per hundred pounds, it would appear to us that the rate quoted Mr. Marshall for the movement of his ties, distance being considered, was very reasonable.

I do not think that the Texas & Pacific Railway can be criticised in the efforts to obtain its absolute needs at the lowest possible figure. Am satisfied that if any competitive concern had been prepared to offer cypress or oak ties at anywhere near the figure at which we are buying from the present contractor, their offers would have been promptly accepted.

I trust that when Mr. Cockrell has an opportunity of reviewing the entire correspondence he will decide that our position in the matter is not unreasonable and allow us to continue our present policy.

Yours truly,

. . . . . .

(Rec., p. 102-103.) General Freight Agent."

On November 25th, 1907, the General Freight Agent of the Plaintiff in Error wrote the Interstate Commerce Commission as follows:

"Dallas, Texas, Nov. 25th, 1907.

To the Honorable the Interstate Commerce Commission, Washington, D. C.

Gentlemen:—

This company begs to acknowledge receipt of your favor of the 22nd inst., signed by Commissioner Cockrell, enclosing copy of letter which has been transmitted to Mr. Marshall, manager of the American Tie & Timber Co., at Shreveport, relative to rates on oak ties.

We beg to advise that this is the first expression that we have received from the Commission or any of its members, relative to their views on the subject of rates on ties or other material entering so largely into the uses of railroad companies.

This company has no desire to have or put into effect, rates on any class of material which the Commission view with unfriendly feeling or believe are discriminatory or unjust to patrons of this company. In confirmation of this statement, we beg to advise that instructions have this day been given to apply on legal notice, the lumber rates of the classes to which they belong on ties of every description. Trusting that this will close the correspondence which undoubtedly has been annoying to your Honorable body, in a satisfactory manner, I beg to remain,

Yours truly,

.....

General Freight Agent."

On the same day the General Freight Agent of the Plaintiff in Error requested the Interstate Com-

merce Commission to grant authority to amend its tariff so as to include wooden railroad cross ties and to make the amendment of the tariff effective on five days' notice, said letter being as follows:

"Dallas, Texas, Nov. 25th, '07.

To the Honorable the Interstate Commerce Commission, Washington, D. C.

Gentlemen:—

Referring to our letter of even date in regard to rates on cross ties.

If the Commission deems it advisable, we would be pleased to receive telegraphic authority from them to make our issue establishing these rates, effective on less than statutory notice. In fact, it would materially assist in handling the matter, should the Commission see fit to permit these rates to become effective on five days' notice to the Commission.

Please wire us at our expense on receipt of this letter and oblige.

Yours truly,

. . . . . .

(Rec., p. 105.) General Freight Agent."

In reply to that letter of December 2nd, 1907, the Secretary of the Interstate Commerce Commission wired the General Freight Agent of the Plaintiff in Error as follows:

"Washington, D. C., Dec. 2, ...

E. L. Sargent, Gen'l Frt. Agent, Tex. & Pac. Ry. Co., Dallas, Texas.

Your letter to Commission, November twenty-five. If you make application in regular form for permission to establish on less than statutory

notice the rates referred to, it will have prompt consideration.

(Rec., p. 106.) E. A. MOSELEY, Secty."

On December 4th, 1907, Interstate Commerce Commissioner Cockrell wrote the General Freight Agent of the the Plaintiff in Error as follows:

"Washington, December 4, 1907.

Mr. E. L. Sargent, General Freight Agent, Texas & Pacific Railway Company, Dallas, Texas.

Dear Sir:

Please accept my sincere thanks for your favor of the 25th, ultimo, File 1-A; also your favor of the same date asking permission to make your rates on ties effective in five days.

A telegram was sent you on the 2nd instant, stating that if you make application in the regular form, prompt attention will be given it. I hope this will end the many letters we have been receiving in regard to ties.

In acting as a friendly intermediator, we have been able to adjust about four-fifths of the complaints that have been received, without the formality of a hearing and trial. So far as I can, I am aiming to adjust all complaints as speedily as possible and as many of them as possible, without a formal hearing and the expenses and annoyance of having shippers and carriers attending our hearings. Where I feel certain what the law is, I prefer telling the shipper that he has no case, or telling the railroad plainly that the case is against them.

Very truly yours,

F. M. COCKRELL,

(Rec. pp. 106-107.) Commissioner."

On December 7th, 1907, the Plaintiff in Error made formal application to amend its joint lumber tariff, so as to include and name wooden railroad cross ties among the list taking lumber rates.

Said letter is as follows:

"Dallas, Texas, December 7th, 1907.

To the Interstate Commerce Commission, Washington, D. C.

The Texas & Pacific Railway Company, by E. L. Sargent, its General Freight Agent, does hereby respectfully petition the Interstate Commerce Commission that it be permitted, under Section 6 of the Act to Regulate Commerce, as amended June 29th, 1906, to put in force the following rates, to become effective five days after the filing thereon with the Interstate Commerce Commission.

Lumber rates of the classes of lumber to which they belong, on wood railroad ties, carloads, from points on the Texas & Pacific Railway, in Louisiana, Arkansas and Texas to interstate points.

Your petitioner further represents that the said rates above mentioned will be published in various Tariffs and Supplements.

And your petitioner further bases such request upon the following facts, which present certain special circumstances and conditions justifying the request herein made.

We desire to establish rates on this business in accordance with the views of Commissioner Cockrell, expressed in his letters of November 2nd and December 4th, 1907, and our application to make the rates effective five days after the filing thereof with the Interstate Commerce

Commission is due to the fact that shipments of oak cross ties are offering for interstate points, which cannot now be accepted, as there are no tariffs filed with the Interstate Commerce Commission to cover.

THE TEXAS & PACIFIC RAILWAY CO.

By.....,
General Freight Agent."

(Rec., p. 107.)

On December 11th, 1907, the Secretary of the Interstate Commerce Commission wrote the General Freight Agent of the Plaintiff in Error as follows:

"Washington, December 11, 1907.

Mr. E. L. Sargent, General Freight Agent, Texas & Pacific Railway Company, Dallas, Texas.

Dear Sir: Referring to your application of December 7, 1907, for permission to establish upon less than statutory notice application of lumber rates to wood railroad ties, etc., I beg leave to advise that you should amend the application in question to show the I. C. C. numbers of the schedules in which the desired application will be published.

I note also that your application reads, 'Lumber rates of the classes of lumber to which they belong.' It is not entirely clear just what is intended by that description, and the Commission will be pleased to have your amendment of the application in addition to showing the I. C. C. numbers as above requested, make the meaning of the clause above quoted specific and

definite. Upon receipt of such an amendment prompt action will be taken on your application.

Very respectfully,

E. A. MOSELEY, Secretary."

(Rec., p. 108.)

On December 18th, 1907, the General Freight Agent of the Plaintiff in Error wrote the Interstate Commerce Commission as follows:

"Dec. 18th, 1907.

Hon. F. M. Cockrell, Commissioner, Interstate Commerce Commission, Washington, D. C.

Dear Sir: Referring to your letter of December 4th, and other correspondence in regard to the question of establishing interstate rates on railroad cross ties.

Herewith, copy of our formal application under date of December 7th, which was made in accordance with suggestion contained in Secretary Moseley's telegram of December 2nd. It now appears from Mr. Moseley's letter of December 11th, it is not considered in proper form.

By referring to the lumber rates of the classes of lumber to which the ties belong, we, of course, mean that oak ties are to take oak lumber rates; pine ties, pine lumber rates; cypress ties, cypress lumber rates, and so on. Pine and cypress ties are now covered as per the above in practically all territory, but it was our idea to have the authority complete so that our publication need not specify the different kinds of cross ties.

In explanation of our general application, will state that our idea was to meet the views of the Interstate Commerce Commission as quickly as

possible. It is impracticable for us to specify, at this time, in an application the particular tariffs that would be amended, as some of them would be issued by agents having our power of attorney; in other cases, we would be obliged to secure the concurrence of connecting lines before publishing joint rates, and in the meantime, while waiting for such authorities, the original tariffs might be reissued or additional supplements issued; therefore, we wished to obtain the general authority from the Commissioner and then proceed with the publication of tie rates, making them effective in the individual cases, five days after we file the issues in the office of the Interstate Commerce Commission.

By referring to your file you will see that on November 25th, we indicated our willingness to establish these rates, and perhaps, in view of what has transpired, we would have made better progress by giving statutory notice at the time, instead of attempting to secure authority to establish rates on less than statutory notice, as we do not appear to have progressed very far in our efforts to adjust the matter. First, because we had not filed our application in the usual form (which we had not considered necessary, owing to the nature of the entire correspondence with you), and now it is stated that our application is not specific enough. It would, therefore, seem that the matter might run along indefinitely unless you are in position to interpose some assistance in adjusting the matter for us. We are entirely willing and anxious to meet the view of the Commission, and in fact, would like to do so on five

days' notice heretofore specified, but if in your opinion the circumstances surrounding the transaction are such as to render it impracticable to issue such special authority, if you will advise to that effect, we will proceed to issue the tariffs as quickly as possible, effective on the usual statutory notice. We will be under further obligations if you will kindly take the matter in hand and indicate your wishes in the premises, in order that we may proceed as near as we can in accordance, therewith.

Yours truly,

....,

General Freight Agent."

(Rec., pp. 109-110.)

In answer to the foregoing letter, a letter, dated January 17, 1908, a letter was received from Mr. Clark, one of the Interstate Commerce Commissioners, addressed to the General Freight Agent of the Plaintiff in Error, which is as follows:

"Washington, January 17, 1908.

Mr. E. L. Sargent, G. F. A., Texas & Pacific Rt. Co., Dallas, Texas.

Dear Sir: Yours of the 18th, ultimo, to Commissioner Cockrell (File 2353) is referred to me for reply.

The very conditions which you cite in support of your desire to have the general far-reaching permission to issue rates on less than statutory notice, as per your request, seem to me to furnish the best argument against the issuance of the permission. To grant it would be to authorize changes in an indefinite number of tariffs

published by an unknown number of persons or carriers; and no one can for-see what complications might grow out of the incorporation of changes under that permission entirely foreign to the original intent.

It is apparent that better headway and better results would have been had in this matter if you had proceeded to change the tariffs under statutory notice. We are willing to exercise our authority for changes in rates on less than statutory notice to a reasonable extent and under conditions which we believe were contemplated in the law, but we cannot issue wider or general blanket permissions of this kind. We are willing to grant such permissions in specific instances as you may find it necessary to request in order to make your lumber rates include ties; the idea being to have ties take the same rates as lumber manufactured from the same wood.

Yours truly,

E. E. CLARK,
Commissioner."

(Rec., p. 110.)

The Interstate Commerce Commission being fully advised as to the contents of T. & P. Joint Lumber Tariff No. 8500-H, showing rates on lumber from points in Louisiana and Arkansas to Linwood, Kansas, and the desire of the plaintiff in error to amend said tariff so as to include wooden railroad cross ties as articles taking the same rate, refused to grant permission to do so in less than the full statutory time of thirty days.

The Interstate Commerce Commission evidently did not consider railroad cross ties as lumber, and

was evidently of the opinion that cross ties could not be shipped or transported on the lumber rate or T. & P. Lumber Tariff No. 8500-H, without the tariff was first amended so as to include such cross ties in the list of articles taking the lumber rate.

R. C. Andrews, a witness for defendant in error, testified as follows:

Q. Mr. Andrews, are you the Mr. Andrews who was Superintendent of the Texas & Pacific—assistant superintendent at Marshall?

A. Yes, sir.

Q. What are your initials?

A. R. C.

Q. Did you hear the correspondence read, purporting to be from you to the American Tie and Timber Company, Limited, regarding shipments of ties?

A. Yes, sir.

Q. At the time you received—did you receive that letter from the American Tie and Timber Company?

A. Yes, sir.

Q. And you wrote the reply that was introduced in evidence?

A. Yes, sir; I wrote it.

The correspondence referred to was a letter dated November 17, 1907, addressed to Mr. Andrews, requesting cars for the shipment of cross ties from points in Louisiana to Linwood, Kansas, signed by the defendant in error. (Rec., p. 27.) And Mr. Andrew's reply, dated November 18th, 1907, stating that they would probably be able to furnish some cars in a few days. (Rec., p. 28.) Said witness, Andrews', testimony continued as follows:

Q. What department of the Texas & Pacific Railroad is under your charge?

A. The transportation.

Q. What do you mean by that?

A. The furnishing of cars and moving freight.

Q. What department of the Texas & Pacific Railroad, especially, handles the question of rates?

A. The traffic department.

Q. Are you at all times advised as to the rates on the T. & P.?

A. No, sir.

Q. Does it ever occur that mistakes are made as to rates by the operating department?

A. I think so.

Q. What was your experience in this instance about the tie question? You got a request to furnish cars for ties?

A. Yes, sir.

Q. Did you examine to see whether the rate was in on ties or not?

A. I did not.

Q. Did you learn whether there was or not?

A. Yes; I was advised shortly afterwards that no rates were in effect by which these ties could be moved.

Q. Upon receipt of this information, what did you do?

A. We instructed the agents along the line to not accept for shipment oak ties billed to interstate points, for the reason that there were no rates in effect by which they could be moved at that time.

Q. If a person requested cars from you for any commodity that you did not know whether there was any rate on it, what would—would you furnish the cars?

A. Yes; I presume that there was a rate in effect by which the commodity could be moved.

Q. If you found out later that there was not, what action would you take?

A. I would instruct the agents not to accept the shipment. (Rec., p. 91.)

H. S. Hinton testified as follows:

Q. Mr. Hinton, are you the T. & P. Commercial Agent at Shreveport?

A. Yes, sir.

Q. Did you, in the fall some time of 1907, have occasion to communicate with Mr. Marshall of the American Tie & Timber Company, about rates applicable on ties?

A. Yes, sir; I did.

Q. Whether there was a rate on ties?

A. Yes; I received a letter from Mr. Sargent, requesting me to call on them.

Q. Do you remember what date that was?

A. Well, I believe I called on them—I think it was September 28th, 1907.

Q. I didn't catch the date.

A. September 28th, is my recollection—1907.

Q. What message or information did you deliver to Mr. Marshall?

A. Well, I told him that I was requested to call on him by Mr. Sargent in answer to his letter and to say to him that we had no published commodity rate on oak ties from Sodus, Marthaville, etc., to Linwood and Junction, Kansas, and some other point.

Q. What did you tell him about whether or not you had any rate?

A. I told him we had no published commodity rate on oak cross ties.

Q. Between the points he inquired about?

A. Yes, sir.

(Rec., p. 93.)

Q. Well, what did Mr. Marshall say to you about it?

A. Well, he—well, I told him in connection with that, certain figures Mr. Sargent would undertake to have published, provided they were satisfactory to him, and gave him a reasonable time to get them —comply with the Interstate Commerce Commission.

Q. Certain figures Mr. Sargent will publish—what was the idea in publishing?

A. Well, I had no published—I gave him no published figures, because we didn't have any.

Q. You mean by that you gave him certain figures of a rate you would put in, provided it was acceptable to him and he would use it?

A. Yes; that is the idea.

Q. What rate did you express to him—propose to him to put in?

A. The rate was fifty cents to Linwood and Grand Junction. (Rec., p. 94.)

E. L. Sargent, General Freight Agent of the plaintiff in error, testified as follows:

Q. What is the first thing you had to do with the offer of the American Tie & Timber Company to ship some ties from Louisiana to Linwood, Kansas—what is the first information you had about that.

A. A letter from the commercial agent is my rec-

ollection. After we had sent them a tariff on lumber they wanted a rate on cross ties.

Q. The first you heard from them was a request for a lumber tariff?

A. Yes, sir.

Q. What was furnished?

A. It was furnished through our commercial agent.

Q. What is the first communication you had from him, relative to ties?

A. I would have to look at my memorandum; I don't recollect. (Refers to memorandum). September 24th; however, I think the documents are all on file.

(Witness is shown letter.)

Q. Is that the letter?

A. That is a part of it.

Q. Copy of the letter you received from the American Tie & Timber Company?

A. Yes, sir. (Rec., p. 96.)

Q. What did you do in response to that letter?

A. On September 25th we replied to them through Mr. Hinton that there were no rates of freight, but offered to put in a fifty-cent rate if we were assured it would be used.

Q. When did you next hear from them about that?

A. Mr. Hinton advised us they wanted the quotation that they were not interested in the rate, but were making inquiry for the Union Pacific Railway.

(Objection to the foregoing answer was sustained.)

Q. What was the next you heard directly from the American Tie & Timber Company or from the Interstate Commerce Commission?

A. We had a letter under date of November 7th, 1907, from the Interstate Commerce Commission, enclosing the copy of a letter of complaint from the American Tie & Timber Company of date September 30th—a letter from the Interstate Commerce Commission to E. L. Sargent, dated November 7th. I think you introduced it yesterday. (Rec., p. 97.)

In this connection the following letter from Hon. F. M. Cockrell, Commissioner, to the General Freight Agent of the plaintiff in error was read as follows:

October 7, 1907.

Mr. E. L. Sargent, General Freight Agent,
Texas & Pacific Ry. Co., Dallas, Texas.

Dear Sir: Herein I send you copy of a letter received from the American Tie & Timber Company, Limited, of Shreveport, La., dated September 30, 1907, complaining of discrimination and of refusal to transport products.

Please look into this matter and advise the Commission what your road can do, or will do in the premises, and oblige,

Yours truly,

F. M. COCKRELL,
Commissioner."

The correspondence following this letter is hereinbefore copied. .

Q. After receiving that letter I have just read, Mr. Sargent, what steps were then taken in the matter?

A. We proceeded to submit certain tariffs making lumber rates apply on ties. This particular case,

the supplement was 172, issued the 13th day of January—made effective February 16th, 1908.

Q. Mr. Sargent, in establishing a joint through rate; that is, over more than one line, what are the steps that are necessary to make in the formation of that tariff?

A. The necessary correspondence with the traffic officials of the lines that form the through line contemplated, get their permission to first establish through rates and afterwards agree on a division of the through rate.

Q. After you have established the amount and division with the different lines interested, you are then in position to—

A. In position to file with the Interstate Commerce Commission.

Q. After the necessary statutory publication. In establishing one line rates over your own line, you can do that immediately?

A. If it is an interstate rate it can be filed with the Commission, but the regular thirty days' notice must be given.

Q. Your portion, you can make at once; as soon as determined to make a rate over your own line, the only thing necessary for you to do is to file immediately with the Interstate Commerce Commission?

A. Yes, sir.

Q. If over a through line you have to have authority from the connecting line, is that the idea?

A. That is the idea.

Q. Now, in order to meet this situation here: get in a rate on ties, did you have to make the rate over more than one line?

A. We had to take it with the—with our connec-

tions—Linwood in this case; we had to take it up with the Missouri Pacific and the Union Pacific officials.

Q. Did you have any way by which you could immediately, and without doing that, file the tariffs?

A. We had no authority; no sir.

Q. You had no authority over these other roads?

A. No, sir.

Q. You applied to the Commission for authority to put in the rate on five days' notice after the filing of that application? (Rec., p. 111.)

Q. Was it your understanding that the form of application you made was proper and ordinary manner in which to apply for that kind of emergency rate?

A. Yes, sir.

Q. And this correspondence then ensued between you and the Interstate Commerce Commission, relative to the form of your application?

A. Yes, sir.

Q. Mr. Sargent, when did you determine you were not making progress by that effort and abandoned it?

A. When we received the letter from Commissioner Clark stating that he would not grant this application.

Q. What were you doing in the meantime and before you got that letter from him?

A. We had correspondence with our connecting lines to see, in case they would join us in the rate.

Q. On receipt of that letter?

Q. Up to the time you received that letter, what was your attitude in the matter?

A. We were awaiting that permission.

Q. Waiting on the Interstate Commerce Commission.

A. We couldn't do anything without the permission.

Q. You had the matter up with them and your idea was that you had to wait until you heard from them?

A. That is the law; yes. (Rec., p. 112.)

Q. How long have you been General Freight Agent of the Texas & Pacific?

A. Since September first, 1892.

Q. When was the first time you learned that there had been ties shipped out of Louisiana—from Louisiana points under tariffs then in effect?

A. I don't believe I catch your question.

Q. Did you learn that there had been some ties shipped out prior to the amendment of this tariff?

A. Yes, sir.

Q. From what point?

A. My recollection is: Cypress, Chopin and Fouke, Arkansas, the first two in Louisiana.

Q. What did you do with reference to that situation when it came to your knowledge?

A. My recollection is we wired the superintendent at Texarkana in regard to shipments from Fouke, and wrote the other gentlemen, direct, calling their attention to the fact that we had no rate. (Rec., p. 113.)

Q. Mr. Sargent when you found this out did you —what did you advise the agent about it? What steps did you take?

A. When we noticed from the reports that oak ties were moving from Arkansas and Louisiana to interstate destinations, we called on the agent for explanation as to why he was billing such commod-

ity on which he had no legal tariffs to cover. (Rec., p. 113.)

Q. Did you get an explanation from him?

A. I did.

Q. After you got his explanation, what did you do then?

A. We notified him he must not accept any more oak cross ties for interstate destinations, for the reasons that no legal published tariffs to cover the movement of—

Q. Did you learn what rate he was using—applying to these shipments?

A. In the case of the agent at Fouke, he was using a rate promulgated by the Texas Railroad Commission.

Q. To what does that apply?

A. Intrastate; wholly within the State of Texas.

Q. Fouke was in what state?

A. Arkansas.

Q. State whether or not that matter was called to the agent's attention?

A. It was.

Q. What was he advised with reference to further shipments?

A. To cease making shipments without tariffs to cover.

Q. Agents at other points; what other points—did you learn what tariffs they were applying to the shipments?

A. I don't recollect the exact reasons they gave, but they stated they were applying certain tariffs, in which oak cross ties were not enumerated, consequently no rate on them. (Rec., p. 114.)

Q. What advice did you give with reference to further shipments?

A. They must not accept or forward any further shipments of oak cross ties without having a specific tariff rate to cover it.

Q. Mr. Sargent from your experience in rate making and in construction of tariffs—I will ask you this question first: I believe you stated you were at the head of the traffic department of the Texas & Pacific Railroad?

A. Head of the freight traffic department.

Q. Who is the party for the Texas & Pacific Railroad Company that construes, formulates and construes tariffs, etc.?

A. The general freight agent.

Q. You occupy that position?

A. I do.

Q. The ultimate decision of matters of that kind are for you?

A. Yes, sir.

Q. Were you familiar with the T. & P. tariffs in effect in the fall of 1907, covering lumber and products of that kind?

A. Yes, sir. (Rec., p. 115.)

Q. Has the question come up for your—for determination within your department, as to whether or not cross ties are included in lumber in T. & P. tariffs?

A. It has. (Rec., p. 115.)

Q. Did you in this instance pass on this question?

A. In this particular instance I did.

Q. For the Texas & Pacific Railway?

A. Yes, sir.

Q. What was your decision in the matter?

Mr. Rodgers: We object.

The Court: I sustain the objection; his action is of record in the documentary evidence introduced.

Mr. McCormick: You say the Texas & Pacific does act on your judgment in matters of this kind?

A. Yes.

Q. And on your advice and judgment in this matter how did they treat the question of whether cross ties are lumber, in the construction of their lumber tariffs?

Mr. Rodgers: We object; it is irrelevant, incompetent and immaterial how the Texas and Pacific treats a certain article of commerce.

The Court: I sustain the objection.

Mr. McCormick: We except to the ruling of the Court.

The Court: You can have your exception; the question indicated by the Court has not yet been put and that is as far as this witness can go, in the opinion of the Court. He can give his opinion as a man versed in traffic affairs.

Mr. McCormick: I thought that was the exact question I asked when originally objected to.

The Court: It was not.

Mr. McCormick: From your experience in the business have you formed an opinion as to whether cross ties are included in the term lumber?

Mr. Rodgers: We object; it is immaterial and incompetent.

The Court: He has stated. I will permit the question to stand. There is a very large distinction between permitting this witness to assert that he knows whether or not cross ties should be treated as lumber, and permitting him to give his opinion as an expert as to whether in his judgment—not the opinion of the railroad world, but his own opinion as an expert in these affairs, oak cross ties should be considered as lumber in a tariff.

Mr. McCormick: I asked him if he had formed an opinion.

The Court: I overruled objection to that.

Mr. McCormick: You say you have formed an opinion; what is your opinion, as an expert, as to whether or not ties should be construed as lumber or not?

(After objection was overruled, witness answered.)

A. In my opinion a tariff which applies on lumber, mentioning specific articles that take the lumber rates, would not apply on railroad cross ties unless they were specifically mentioned in the tariff. (Rec., p. 116.)

This witness also testified that T. & P. Joint Through Lumber Tariff, 8500-H, is a commodity tariff. (Rec., p. 127.)

Mr. McCormick: Mr. Sargent as originally promulgated, does this tariff contain any provision as to ties? Are you familiar with the making up of tariffs?

A. I don't say that I am; there is a page there, pretty well toward the back that specifies the rate on lumber, and then gives a list on which lumber rates apply; it speaks for itself.

Q. Is that the only page in the original tariff showing the aplication?

A. Yes, page 76, of 8500-H.

The Court: That is before the jury as I understand it. (Rec., p. 128.)

Q. "Application of rates. List of Articles Taking Lumber Rates and Higher.

"Rates named herein will apply on lumber (excepting butternut, cherry, walnut and foreign woods of value;) also the following articles when manufac-

tured of woods other than butternut, cherry, walnut or foreign woods of value, in straight or mixed carloads."

Then follows a lengthy list of articles in which ties do not appear.

Q. Mr. Sargent, this tariff I see here is amended from time to time; I wish you would examine it and say when ties first appeared in the tariff?

A. Supplement 172 is the amendment. Effective February 16, 1908.

Q. That is the first?

A. That is the first time made effective.

Q. Oak?

A. Yes, sir.

Q. When was it effective on gum and willow?

A. Effective on pine and then we put in rate on gum and willow effective October 18, 1907.

Q. Look at page 6, supplement 159, does that show ties?

A. "Pine cross ties, cypress cross ties, effective March 15, 1907."

Q. Is that the first time that appears?

A. Yes, sir.

Q. What was added in that supplement?

A. Pine and cypress cross ties.

Q. Supplement 170 and see if you see what that provides as to ties and when it was effective? Supplement 170, page 5?

A. Page 5 adds gum, cottonwood and willow cross ties.

Q. When did that become effective?

A. This supplement 170 became effective October 5, 1907.

Mr. Rodgers: This is one you filed when the Blocker-Miller complaint matter was up?

A. Yes, I suggested to the Commission, I think it is all mentioned in the correspondence.

Mr. McCormick: Refer to page 3, supplement 172; does that provide anything further with reference to ties?

A. Wood railroad cross ties, carloads. Effective February 16, 1908. (Rec., p. 127-128.)

Mr. McCormick: Prior to the time pine ties were included, what provision—

A. We didn't understand that unless specifically mentioned in the lumber tariff that there was any rates at that time.

Q. Have you ever had any rates on ties not included in the lumber rates?

A. We put in interstate rates on ties specifically bentioned, my recollection is—

Q. Was that a class rate or commodity rate?

A. Commodity.

Q. Had they been treated as a commodity and took class rates—

A. No, they were considered a commodity by themselves.

Q. Considered by you as a particular commodity and had been so treated up to the time this amendment took effect?

A. Yes, sir.

Q. The latter—what are they treated as now?

A. Commodity.

Q. Still treated as a commodity?

A. Yes, included with the commodity of lumber by specific reference. (Rec., p. 129.)

Mr. McCormick: Mr. Sargent have you made any provision, or is there any provision made among railroads generally, for the correction of any error that might arise in the application of rates?

A. Every railroad has an accounting department, and revising department, for revising rates placed on way-bills. They are furnished by the freight office a copy of all freight tariffs and the revising clerk checks the rates in the tariff as against the rates in the way-bill.

Q. In a shipment moving over two lines, what is the custom as to which road does the revising of the rate?

A. Both roads should revise the rates, but as a rule the delivering line is supposed to be responsible for the tariff provision in the rate.

Q. If a rate has been found wrongfully applied, what is the course taken?

A. The revising clerk sends notice to the agent and corrects it to the proper figure. (Rec., p. 129.)

Mr. McCormick: I asked if there was any provision made under the direction of the Interstate Commerce Commission with reference to the inspection of the application of rates. Is there such a provision?

A. There is.

Q. Do any agents, or purporting to act under the authority of the Interstate Commerce Commission visit the Texas & Pacific and other roads for that purpose?

A. We have—The Texas & Pacific employs what is known as tariff inspector; he is supposed to revise every interstate tariff at every station once in six months. (Rec., p. 130.)

Mr. Rodgers: I will ask you this question: This 8500-H tariff is a commodity tariff?

A. Yes.

Q. What commodity, lumber, and not ties?

A. On the commodity lumber and articles taking lumber rates?

Q. Lumber in its generic sense is—certain specified articles?

A. I don't believe I quite catch the drift of generic, I don't understand the word.

Q. Generic, the term lumber—then would you use it as a commodity?

A. We use it on the commodity of lumber and articles specified in it taking lumber rates.

Q. And articles taking higher than lumber rates?

A. Yes, sir. (Rec., p. 131.)

The defendant, The Texas & Pacific Railway Company offers in evidence the following portions of tariffs as described below, viz.:

Joint Through Lumber Tariff, T. & P. No. 8500-H, I. C. C. No. 792, title page, also index No. 4417, showing Linwood, Kansas, note E. G. H., route 11, 24, 54, and rate 24, shown on page 57; Note A, under application of rates, page 65, pages 70 and 71 also showing application of rates; pages 76 and 77, showing a list of articles taking lumber rates and higher; pages 78 and 79 showing routing instruction. (Rec., p. 131.)

Title page, also the following items shown on page No. 4, to Supplement No. 148, to Lumber No. 8500-H, viz.:

> "Application of Rates—Articles Taking Lumber Rates.—Add 'sawed pine and cypress cross ties to list of articles' taking lumber rates as shown in Tariff."

The above being effective August 28th. 1906, as shown on title page alluded to.

Title page, also the following clause on page No.

6, Supplement No. 159 to Lumber No. 8500-H, viz.:

"Effective March 15th, 1907. (Reissue.) Articles Taking Lumber Rates—Add Pine Cross ties and Cypress Crossties to list of articles taking Lumber Rates as shown in Tariff, as amended."

Title page, also the following item appearing on page No. 5 to Supplement No. 170 to Lumber Tariff, No. 8500-H, viz.:

"Application of Rates—Articles Taking Pine lumber 'Rates—Add gum, cottonwood and willow crossties to list of articles' taking yellow pine lumber rates, as shown in Tariff, as amended."

The above being effective October 25th, 1907, as shown in title page alluded to.

Title page, also the item shown on page No. 3, to Supplement No. 172 to Lumber No. 8500-H, reading:

"List of Articles Taking Lumber Rates and Higher—Add 'the following list of articles taking lumber rates shown" on page No. 76 of tariff, as amended: —Wood railroad 'cross ties, all kinds, carloads.'"

Which change was effective February 16th, 1908, as shown on title page alluded to above. (Rec., p. 131.)

In addition thereto the following portions of the following issues are also offered in evidence, viz: The Western Classification No. 43, I. C. C. No. 1, issued October 1st, 1907, effective October 1st, 1907, reprint of the Western Classification No. 42, page 116, Item No. 10, which provides as follows:

"Ties, railroad (Wood). Subject to regulations and "rates in tariffs of the individual carriers."

Title page of amendment No. 6 of T. & P. JB-66 A. (I. C. No. 1626) and that portion of page 2 thereof, reading as follows:

"Effective October 3rd, 1906.
(Reissue in part of Amendment No. 5 to J. B. No. 66-A (I. C. C. No. 1409).
Rates in Cents per One Hundred Pounds.
On Pine Lumber, Sawed Pine Cross Ties, Sapling Pine Poles for Mining Timbers, carloads, Minimum Weight 30,000 Pounds; from points on T. & P. Ry. in Texas, Louisiana and Arkansas, Alexandria, La., and West; to El Paso, Texas, when destined points in Arizona and New Mexico. Proportional Rates, 18. (Rec., 132.)
On Telephone Poles, Carloads, Minimum Weight, 30,000 Pounds; from points on T. & P. Ry. in Texas, Louisiana and Arkansas, Alexandria, La., and West; to El Paso, Texas, when destined points in the Republic of Mexico. Proportional Rates, 18. (Rec., p. 132.)

Also that portion of Supplement No. 19 to Lumber Tariff T. & P. No. 5-A (Supplement No. 18 to I. C. C. No. 1401) reading as follows:

"Refer to above described Tariff and add as follows:
Effective June 27th, 1907.
(Reissue I. C. C. No. 1693, Amendment No. 8 to J. B. No. 66-A.)
Rates in Cents per One Hundred Pounds.
On Pine, Lumber, Pine Cross Ties, Sapling

Pine Poles and Mining Timbers, Carloads, Minimum Weight, 30,000 Pounds; from points on T. & P. Ry. in Texas, Louisiana and Arkansas, Alexandria, La., and West; to El Paso, Texas, when detined points in Arizona and New Mexico. Proportional Rate, 18.

Attach this to the tariff and make it a part of same." (Rec., p. 131-132.)

E. E. Smith, General Freight Agent of the Kansas City Southern Railway Company, testified that railroad cross ties do not come under the designation of lumber. (Rec., p. 133.)

S. G. Reed, a witness for plaintiff in error, testified that he was Assistant General Freight Agent of the Houston & Texas Central Railroad, and that as such it became necessary for him to pass upon and construe tariffs on his own road, as well as other railroads.

Questioned further, the witness testified to-wit: Basing your opinion on the service—your service and experience in the construction of railroad freight tariffs, do railroad cross ties come within the term lumber?

To which the witness answered:

I don't consider and have never considered, in interpreting tariffs that lumber, that it included ties unless it specifically mentions ties. (Rec., p. 138.)

Plaintiff in error also intrduced in evidence certified copy K. C. S. Freight Tariff No. 878-D, issued November 1, 1907, effective December 5, 1907, on ties, wooden, except yellow pine, in carloads, stations on Kansas City Southern, to Kansas City, Missouri, as shown on page 3. On page 3, rate from Alleene, Arkansas, to Kansas City is 19c per hundred pounds,

from Horatio, Arkansas, 19c per hundred pounds; Granis, Arkansas, 19c per hundred pounds. From Frierson, Louisiana, on down to Port Arthur, Texas, all stations south of Texarkana, 23 cents per hundred pounds. (Rec., p. 140.)

Mr. Geo. T. Atkins, Chief Clerk of the General Freight Agent of the M. K. & T. Ry. Co. of Texas, testified as follows:

Q. What experience, if any, have you had, Mr. Atkins, in the formation of or promulgation of railroad tariffs and in the interpretation and construction of railroad freight tariffs?

A. Well, in the actual issuance and promulgation of tariffs, about six years and about nine years in the construction of them; but for a period of six years I was actually engaged in issuing and constructing tariffs under the direction of the general freight agent.

Q. Who does that work, who has direct supervision of the work of issuing and promulgating interstate tariffs for the Katy railroad?

A. The general freight agent.

Q. What I want to get at is, who does the work, who does the work?

A. It is under my supervision; I do, under his supervision.

Q. You are under the general direction of the general freigth agent?

A. Yes; I carry out his policy.

Mr. McCormick: Do railroad cross ties, in your opinion, based upon your experience in the formation and promulgation of freight tariffs, come within, the meaning of lumber?

A. They do not. (Rec., p. 141.)

This witness testified that the M. K. & T. Ry. Co. was a party to T. & P. Joint Through Lumber Tariff No. 8500-H ,(Rec., p. 142), and in speaking of said tariff he testified as follows:

The Court: What does this purport to be?

A. This is a Joint Through Tariff—Lumber Tariff, making rates on lumber from points on the Texas and Pacific and specified connections in Louisiana and Arkansas to points on various connections.

Q. Is that what you term a commodity tariff?

A. Yes; that is a commodity tariff.

Q. Where do you ascertain in it—you are accustomed to handle this character of tariff or not?

A. Yes, sir.

Q. In the discharge of your duties; where in the course of this sheet—this pamphlet do you ascertain to what articles this commodity tariff is applicable?

A. The articles shown as taking lumber rates.

Q. Where is that, here?

(Some one said, "page 76.")

The Court: Let him answer; you turn to 76 and refer me to page 76—

A. Yes; articles taking—

Q. Are these all the articles to which this tariff shows, applies?

A. Yes, sir.

Q. That this promulgated tariff applies to?

A. That is all they apply to.

Q. That is all they apply to?

A. Articles enumerated therein.

Q. The first—the head of that is articles taking lumber rate and higher. Underneath that is as follows: "Rates named herein will apply on lumber," then in parenthesis, "except butternut, cherry, walnut and foreign woods of value." To what would

this tariff apply were that all that was there and no list appended—no list of excepted articles?

A. Well, it couldn't apply, in my opinion, to anything that was not named, as to whether it was lumber, the commission holds that a tariff has got to specify—that the rates cannot be made to apply on analogous articles.

Q. It then proceeds as follows: "Also on the following articles when manufactured of wood, other than butternut, cherry, walnut and foreign woods of value, in straight or mixed carloads." Then follows a list of articles to which it applies. In the construction and interpretation of tariffs, what is the effect of naming certain articles to which the tariff applies as affecting other articles not named, if it has any effect?

A. Well, it would not have any effect on articles not named. It would simply have the effect of making the rates named therein applicable to lumber and articles named taking the lumber rates.

Q. Would be applicable to articles not numerated?

A. It couldn't be under the Interstate Commerce Commission.

Q. By what process is it determined whether or not a given article made of wood is lumber and shall fall under the general designation of lumber?

A. Well, as I understand it, it is covered—the trade; articles that are covered—spoken of, sold and handled as lumber; there are some few exceptions, though some articles enumerated in their nature are manufactured, is lumber; interior decorations and such things as that are designated by the lumber trade.

Q. In your opinion, applying the usage and cus-

tom pertaining to the designation of articles classed as lumber, would oak ties be considered lumber?

A. I should say under no circumstances unless they were specified.

Q. Why?

A. Well, in the first place, I don't believe they are lumber; I don't believe they are considered such by the commercial trade, that they are not established and understood as such, and in the next place on account of the rule of the Interstate Commerce Commission stating that all articles—that rates on all articles must be specific, they cannot be analogous. (Rec., p. 143-4.)

T. M. Lucas, witness for plaintiff in error, testified that he was engaged in the retail lumber business in Dallas, Texas; his company was The Mayfield Lumber Co., and he was in charge of the company as manager, and had been in the lumber business since 1900, and further testified as follows:

Q. Have you had experience in handling and shipping lumber of different kinds—all kinds?

A. All those generally used in this section.

Q. Do you handle railroad cross ties?

A. Not in stock, we don't retail them.

Q. From your knowledge of the handling of the lumber business, do you consider ties as lumber?

This question was objected to, and sustained. Then the witness testified as follows:

Mr. McCormick: How is lumber sold?

A. By the thousand feet?

Q. How are ties sold?

A. By the piece—tie.

Q. How are—do you ship lumber—have you shipped any lumber?

A. Yes, sir.

Q. Have you ever shipped any ties?

A. Only for the street car company.

Q. What kind of ties were they?

A. Creosoted pine ties.

The Court: I will permit the witness to testify.

Mr. McCormick: From your experience in handling lumber and ties, are railroad ties lumber?

A. No, sir; we don't carry them— (Rec., p. 147-8.)

Geo. W. Signor, a witness for the plaintiff in error, testified that he had been in the railroad tie business and lumber business since 1867, and being questioned, answered as follows:

Q. At what different places were you engaged in and interested in the lumber business?

A. I have carried that on more or less with my tie business, buying and furnishing railroad lumber.

Q. Operating individually or through a company?

A. Well, we have a corporation, independently, though, a good deal of the time; I am president of the company.

Q. What is the name of the company?

A. Geo. W. Signor Tie Company.

Q. Have you ever been a shipper of ties, Mr. Signer?

A. Yes.

Q. To what extent?

A. I can't hardly tell you; I have shipped a good many millions, I think.

Q. Have you ever shipped a tie on the lumber rate?

A. No, sir; I never have. (Rec., p. 149.)

Q. On what kind of rates have you shipped ties?

A. The most of the time we always had a tie rate, so much a tie and a minimum carload according to the capacity of the cars.

Q. Do you know from your experience in having shipped that particular class of freight, what ties are designated in freight parlance?

A. I don't understand that quite well.

Q. From your experience in shipping ties, do you know what, in freight parlance, ties are designated, from a freight standpoint?

A. It is a tie rate, is all I know.

Q. What different class of rates are applicable to different kinds of things?

A. I don't know how many different rates there are, but I know there is a difference—there are different rates.

Q. What is the lumber rate, for instance; what is it called?

A. It is called lumber rate.

Q. How is it classed, what kind of rate, what class rate?

A. Classed so much a hundred, by weight.

Q. From your experience as a shipper of ties and from—do you—are you a manufacturer of ties?

A. Yes, sir.

Q. What is your opinion as to whether or not railorad cross ties are lumber?

A. I never saw them regarded that in my life.

Q. Never saw them regarded as lumber?

A. No, sir.

Q. What is the distinguishing characteristics?

A. Ties are made by the piece; and all the railroads we sell them to has an inspector to see that they are the right size, they must be made the same

size—the same size and quality; they have an inspector to pass upon them; they must not be less than 6x8 to be a standard tie, but they can be over that; they can be wider, and can be a little narrower, that is left to the judgment of these inspectors to say; in sawed ties, they are sawed to the line and practically —the saw mill ain't supposed to judge the character of their size in making—

Q. Is a tie a finished or an unfinished product?

A. Finished.

Q. What is necessary to do to it before it can be used for the purpose for which it is intended?

A. Nothing at all.

Q. How about lumber ordinarily?

A. Well, lumber, of course, has to be manufactured, cut up and formed to be put into something.

Q. Is there any difference in the way ties and other lumber are sold?

A. Lumber is always sold by the thousand feet and ties are sold by the stick, purchased by the stick, sold by the stick, made by the stick; by the piece. (Rec., p. 150.)

Mr. F. H. Shoupe, after being questioned, testified to many ears experience in handling cross ties, as well as lumber, had the following questions propounded to him:

Q. From your experience in handling and dealing in both these commodities the way you have stated, did you consider ties as lumber?

A. No, sir.

Q. What is your answer?

A. I said, no, sir. (Rec., p. 160.)

William Lingo, Vice-President and General Manager of the William Lingo Lumber Company, testi-

fied that he had been in the lumber business a number of years at the city of Dallas, and in his opinion railroad cross ties had not come under the designation of lumber. (Rec., p. 185.)

J. L. Logan, a witness for the defendant in error, testified that he had been in the tie and lumber business for several years, and in the years 1906 and 1907 he shipped pine railroad cross ties on the lumber rate. (Rec., p. 188.) And further testified as follows:

Q. Can you state whether or not as a manufacturer and dealer in lumber, ties are lumber?

A. There are so many different articles, Mr. Rodgers, they are classed as lumber, and we call them—there are different things, like for instance, we speak of stringers, yet bill them as lumber; we always speak of everything coming from a saw-mill as lumber, and bill it that way.

Q. Is that the custom?

A. It is my custom.

Q. If it was pine lumber, hewn pine would be lumber?

A. I will say this; they answer the same purpose; they are used for the same thing.

Q. In your opinion are railroad cross ties lumber?

A. I would say yes. (Rec., p. 189.)

Witness further testified that he had never known hewn oak ties to be bought except by the piece, and that there is nothing to do to a tie before using it. (Rec., p. 192).

H. L. Redfield, Assistant General Freight Agent of the plaintiff in error, testified that ties were not considered lumber at all. That the general lumber

tariff T. & P. 8500-H did not first name any kind of ties as taking the lumber rate. That it was afterwards amended so as to include pine, cypress and gum ties. (Rec., p. 196-197.)

D. G. Petty, a witness for the defendant in error, and its President, testified that he had been in the lumber and tie business for a number of years, and also testified that there was no distinction between railroad cross ties and other forms of lumber. (Rec., p. 203.) He also testified that he shipped cross ties on the lumber rate from points in Louisiana from 1903 to 1907 on the same rates as applied on lumber. (Rec., p. 204.)

He also testified that ties were lumber. (Rec., p. 205.) When the defendant in error wrote this letter of Sept. 30 (Rec., 99) it did not think cross ties were lumber. It then complained that the lumber rate applied to nearly everything except cross ties. That cross ties are lumber is asserted for the first time when this suit was filed, and is evidently an after thought.

A. L. Burke, a witness for the defendant in error, testified as follows:

Q. Are you familiar with the term "lumber" and what it means among railroad men?

A. I think so.

Q. And also among purchasers of lumber?

A. Yes, sir.

Q. Are ties included in the word lumber?

A. I think so, that has always been my supposition. (Rec., p. 209.)

Defendant in error introduced Section 12 of Tariff Circular 14-A, promulgated by the Interstate Com-

merce Commission, effective June 3, 1907, as follows:

> "The law affirmatively imposes upon each carrier the duty of filing with the Commission all of its tariffs and amendments thereto, as prescribed in the law or in any rule relative thereto which may be be announced by the Commission, under penalty of failure so to do, or for using any rate which is not contained in its lawfully published and filed tariffs. The Commission will give such consistent assistance as it can in this respect, but the fact that receipt of a tariff or supplement to a tariff, is acknowledged by the Commission, or the fact that a tariff, or supplement to a tariff, is in the files of the Commission will not serve or operate to excuse the carrier from responsibility or liability for any violation of the law, or of any ruling lawfully made thereunder, which may have occurred in connection with the construction or filing of such tariff or supplement." (Rec., p. 215-216.)

AUTHORITIES.

Sec. 6 Interstate Commerce Act, June 29, 1906.

B. & O. Ry. Co. et al. vs. Pitcairn Co., et al., 315 U. S., 481.

T. & P. Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S., 426.

I. C. C. vs. Illinois Cent. Ry Co., 215 U. S., 452.

Morrisdale Coal Co. vs. Penn. R. R., 230 U S., —.

Mitchell Coal & Coke Co. vs. Penn. R. R., 230 U. S., —.

A. C. L. Ry. Co. vs. Macon Grocery Co., 166 Fed., 206.

Smith vs. Detroit, etc., Ry., 175 Fed., 506.
C. I. & S. Co. vs. K. & M. Ry., 178 Fed., 261.
Franklin vs. Penn. R. R. Co, 203 Fed, 134
Pacific Coast B. Co. vs. Railroad, 20 I. C. Repts., 546.

ARGUMENT.

This is a suit to recover damages for failure to furnish cars and transport oak railroad cross ties from points in Louisiana and Arkansas to a point in Kansas. It is alleged that defendant in error tendered to the plaintiff in error certain cross ties to be transported as above indicated; and that in violation of its duty so to do, the plaintiff in error failed and refused to furnish cars and transport said ties. As a basis for the allegation, that it was the duty of the plaintiff in error to furnish cars and transport said ties, the defendant in error, the Tie Company, alleged that on the 23rd day of May, 1901, the plaintiff in error, Railroad Company, filed with the Interstate Commerce Commission its joint through lumber tariff T. & P. No. 8500-H, applying on lumber, all kinds (except walnut and cherry) lathes and shingles and articles taking same rates from points on the Texas & Pacific Railway to points in Kansas, by and through and under which said lumber tariff, the said defendant established, promulgated and put into effect a rate between points on the line of the defendant plaintiff in error in the States of Arkansas and Louisiana and the town of Linwood, in the State of Kansas, of 24 cents per hundred pounds on oak lumber. That the railroad was guilty of discrimination against oak cross ties and against the locality in which the ties were situated.

Thus it is seen that the sole basis for recovery by the Tie Company is the failure of the Railroad Company to transport the cross ties under the lumber tariff aforesaid. No other tariff was pleaded or referred to by the Tie Company.

Railroad Company answered that at the time the cross ties were tendered to it for shipment, it had no rate applying over its road and connection between points on its line in Louisiana and Arkansas to Linwood, Kansas; that the lumber tariff described in the petition of the Tie Company, naming commodity rates on lumber and certain specified articles taking the same rate, did not apply to railroad oak cross ties, and that under the Interstate Commerce Act, it would have been unlawful for it to have transported or participated in the transportation of such cross ties.

The real issue then for determination, is whether it was the duty of the Railroad Company to have furnished cars and transported cross ties for the rates named in the lumber tariff that did not specify such ties. The only theory upon which said cross ties could legally have been transported, is that they were so analogous to lumber, that they could be received and transported as such and for the rates named in the lumber tariff. In other words, as stated by the trial Court in its charge to the jury, the question was "whether or not such ties are lumber within the meaning and usage of the lumber and railroad business."

On the above issue, which the trial Court made the test of the Tie Company's right to recover, we have quoted at length from the testimony. The most that can possibly be said in support of the finding of the jury upon that question, is that there was barely

sufficient evidence to sustain it. The overwhelming weight of the evidence supports the negative of that proposition, and would have abundantly sustained the finding, that railroad cross ties are not lumber within the meaning and usage of the lumber and railroad business. In all probability that issue, if submitted to another jury, would be found in favor of the Railroad Company. On this record, put in the most favorable light to the Tie Company, one Court and jury might hold that it was the duty of the Railroad Company, under the Interstate Commerce law, to accept and transport cross ties as lumber; and another Court and jury might hold the Railroad Company guilty of a violation of Section 6 of the Interstate Commerce Act in transporting or participating in the transportation of such ties. If such issue, in the state of this record, may be determined by the Circuit Court, independent of any action by the Interstate Commerce Commission, one can see at a glance that there will be an absence of uniformity in the construction, promulgation and application of railroad tariffs. On the other hand, if it is held that such issue must primarily be determined by the Interstate Commerce Commission, there will be absolute uniformity in constructing and promulgating railroad tariffs and in their application to traffic moving over railroads.

Section 6 of the Interstate Commerce law confers upon the Interstate Commerce Commission authority to determine and prescribe the form in which the schedules and tariffs shall be prepared and arranged, and may change the form from time to time as shall be found expedient. In pursuance of that authority, the Interstate Commerce Commission has prescribed the form in which the tariff shall be prepared, and

has specifically ruled that "Commodity rates must be specific and must not be applied to analogous articles." (Rec., No. ~~168, 169~~ 167.) All the witnesses agreed that the lumber tariff mentioned in the petition of the Tie Company is a commodity tariff, and that the rates named therein are commodity rates.

The assignment questions the power of the Circuit Court, in the absence of action by the Interstate Commerce Commission, to determine the issues and award the relief prayed for in this suit. The Tie Company says that by Section 9 of the Interstate Commerce Law, it was given the right to elect whether it would file its complaint with the Commission or in the Circuit Court.

Section 23 of the Interstate Commerce Act provides "that the Circuit and District Courts of the United States shall have jurisdiction, upon the relation of any person or persons, firm or corporation, alleging such violation by a common carrier of any of the provisions of the act of which this is a supplement, and of acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given, by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the rate."

If the Circuit Court has the power to determine the issues and award the relief prayed for in this case, then, we take it, that it certainly would have had the power to have issued a writ of mandamus command-

ing the Railroad Company to move and transport the cross ties on the lumber rate and furnish cars for such transportation. We hardly think it will be denied that if the Circuit Court did not have the power to have issued its writ of mandamus and compelled the Railroad Company to transport the cross ties, under the facts and circumstances disclosed by the record in this case, it necessarily follows that it is without power, under the facts and circumstances disclosed by this record, to determine the issues and award the relief prayed for. If it has the power to do one, it has the power to do the other. If it is without power, under the facts and circumstances disclosed by the record, and compatibly with the Act of Congress to Regulate Interstate Commerce, to have awarded its writ of mandamus, it is equally without power, under the facts and circumstances disclosed by the record and compatibly with the Act of Congress to Regulate Commerce, to consider and decide the subject matters complained of and award the relief prayed for.

We question the power of the Circuit Court to consider and decide the issues in this case, and contend that this is a case primarily for the consideration and determination of the Interstate Commerce Commission. Therefore, we asked that the cause be dismissed without prejudice. The assignment is directed to what we believe to be the erroneous action of the trial Court in failing to sustain our motion.

In B. & O. Ry. Co. et al vs. U. S. Ex Rel, Pitcarn Coal Co. et al, 215 U. S., 481, the coal company claimed that the railroad company was guilty of acts of discrimination against it, in that the railroad refused to move the traffic of the coal company upon terms or conditions as favorable to those given by it to like

traffic under similar conditions, to other shippers, and a writ of mandamus was prayed for and awarded against the railroad. There was sharp conflict in the testimony as to whether the railroad was guilty of discriminating against the coal company in the distribution of coal cars under the rules and regulations adopted and promulgated by it.

Mr. Justice White, now Chief Justice, said:

> "One of the assignments of error which assails the correctness of the conclusion of the Court below to the effect that, compatibly with the Act to Regulate Commerce, there was power, under the circumstances disclosed by the record, to consider the subject matters which were complained of, and to award the relief concerning them which was prayed. Indeed, the nature of the controversy and the relief which it requires is such that even without the assigned error, to which we have referred, the question at the very threshold necessarily arises and commands our attention as to whether there was power in the Courts, under the circumstances disclosed by the record, to grant the relief prayed, consistently with the provisions of the Act to Regulate Commerce, and to that subject we therefore at once come."

The Court then, after reciting the subject matter of the grievances and character of relief required, says:

> "When the situation is thus defined, we see no escape from the conclusion that the grievances complained of were primarily within the

administrative competency of the Interstate Commerce Commission, and not subject to be judicially enforced; at least until that body, clothed by the statute with authority on the subject, had been afforded, by a complaint made to it, the opportunity to exert its administrative functions.

"The controversy is controlled by the considerations which governed the ruling made in Texas & P. Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S., 426, 51 L. Ed., 553, 27 Sup. Ct. Rep., 350, 9 A. & E. A. Cas., 1075. In that case suit was brought in a Court of the State of Texas to recover, because of an exaction by a carrier, on an interstate shipment, of an alleged unreasable rate, although the rate charged was that stated in the schedules duly filed and published in accordance with the Act to Regulate Commerce. After great consideration it was ruled that the relief prayed was inconsistent with the Act to Regulate Commerce, since by that act the rates, as filed, were controlling until they had been declared to be unreasonable by the Interstate Commerce Commission on a complaint made to that body. It was pointed out that any other view would give rise to inextricable confusion, would create unjust preference, and undue discriminations, would frustrate the purposes of the act, and, in effect, cause the act to destroy itself. The ruling there made dealt with the provisions of the act as they existed prior to the amendments adopted in 1906, and when those amendments are considered they render, if possible, more imperative the construction given to the act by that ruling, since, by No. 4, as enacted

by the amendment of June 29, 1906 (34 Stat. at L. 589, Chap. 3591, U. S. Comp. Stat. Supp., 1909, p. 1158), the Commission is empowered, indeed it is made its duty, in disposing of a complaint, not only to determine the legality of the practice alleged to give rise to an unjust preference or undue discrimination, and to forbid the same, but, moreover, to direct the practice to be followed as to such subject for a future period, not exceeding two years, with power in the Commission, if it finds reason to do so, to suspend, modify, or set aside the same, the order, however, to become operative without judicial action. In considering No. 4 in the case of Illinois C. Ry. Co. vs. Interstate Commerce Commission, just decided, it was pointed out that the effect of the section was to cause it to come to pass that Courts, in determining whether an order of the Commission should be suspended or enjoined, were without power to invade the administrative functions vested in the Commission, and therefore could not set aside an order duly made on a mere exercise of judgment as to its wisdom or expediency. Under these circumstances it is apparent, as we have said, that these amendments add to the cogency of the reasoning which led to the conclusion in the Abilene case, that the primary interference of the Courts with the administrative functions of the Commission was wholly incompatible with the Act to Regulate Commerce. This result is easily illustrated. A particular regulation of a carrier engaged in interstate commerce is assailed in the Courts as unjustly preferential and discriminatory. Upon the facts found, the complaint is declared to be

well founded. The administrative powers of the Commission are invoked concerning a regulation of like character upon a similar complaint. The Commission finds, from the evidence before it, that the regulation is not unjustly discriminatory. Which would prevail? If both, then discrimination and preference would result from the very prevalence of the two methods of procedure. If, on the contrary, the Commission was bound to follow the previous action of the Court, then it is apparent that its power to perform its administrative functions would be curtailed, if not destroyed. On the other hand, if the action of the Commission were to prevail, then the function exercised by the Court would not have been judicial in character, since its final conclusion would be susceptible of being set aside by the action of a mere administrative body." The Court, then, after showing that the illustrations made were not imaginary, but had real existence, says, "And the destructive effect upon the system of regulation devised by the Act to Regulate Commerce, which these illustrations show must be the result of construing that act as giving authority to the Courts, without the preliminary action of the Commission, to consider and pass upon the administrative questions which the statute has primarily confided to that body, may be greatly multiplied. This is shown by the opinion of the Commission in the Baltimore & Ohio case, to which we have already referred, where the decisions of other lower Courts referred to in conflict with the opinion of the Court below in this case as to mine rating and not in harmony with the views expressed by the

Commission in the Baltimore & Ohio case.

"The Court below deemed that it was its duty to award to the coal company the relief by mandamus which was prayed, upon the theory that Section 10 of the Act to Regulate Commerce (March 2, 1889, 25 Stat. L., 862, Chap. 382, U. S. Comp. Stat., 1901, p. 3172) rendered it imperative to do so, this conclusion being specially based upon the provision of that section authorizing the remedy of mandamus to compel carriers 'to furnish cars or other facilities for transportation for the party applying for the writ.' "

The above named section is then quoted, and the Court says:

"That it is not necessary to point out that there is ample scope for giving effect to and applying the remedy embraced in Section 10, if that section be construed in harmony with the act, is, we think, obvious. It is to be observed that the section, besides empowering the use of the writ of mandamus to compel the furnishing of cars and other facilities for transportation, also authorizes the use of that writ for the purpose of compelling the movement of traffic 'at the same rates as are charged, or upon terms or conditions as favorable as those given, by said common carrier for like traffic under similar conditions to any other shipper.' As it was settled in the Abilene case that the right to question in the Courts the rates established in accordance with the Act to Regulate Commerce without previous resort, by complaint, to the Commission, in order to determine their unreasonableness, would be destructive of the act, and therefore

was not permissible, that ruling is equally applicable to the provision as to furnishing cars, contained in Section 10, which is here relied upon. But as we are required, for the determination of the case now before us, to consider the scope of the Act to Regulate Commerce as now existing, as a result of the amendments of 1906, we shall not rest our conclusion alone upon the persuastive force of the reasoning which constrained to the conclusion announced in the Abilene case. Speaking generally, it is true to say that, prior to 1889, although the prohibitions of the Act to Regulate Commerce as to preferences and discriminations were far-reaching, the mechanism provided by the statute for the enforcement of orders of the Commission on the subject, as well as those concerning a finding as to unreasonable rates, were deemed to be in many respects ineffective, or at least tardy in operation or unsatisfactory in prompt remedial results, and this because immediate effect was not given to the orders of the Commission, but the aid of judicial authority was required as a prerequisite for such result. Section 10, here relied upon, was not part of the original act, but, as we have said, was added thereto on March 2, 1889, for the obvious purpose of making the remedial processes of the act more speedy and efficacious. Now, it cannot in reason be questioned that among the purposes contemplated by the amendments adopted in 1906 was the curing of the presumed remedial inefficiency of the act by supplying efficient means for giving effect to the orders of the Commission, made in the exertion of the authority conferred upon that body. To that

end, one of the amendments, Section 4, gives operative effect to the orders of the Commission without the sanction of previous judicial authority, and endows that body with the power, not only as to unreasonable rates, but as to practices found upon complaint to be unduly prejudicial and unjustly discriminatory, to correct the same by its order, which order should have the effect within the period fixed in the statute, and, to enforce these provisions, penalties and forfeitures are provided. Section 5. It being demonstrable, as we have seen, that to give to Section 10 the broad meaning which the Court below fixed to it would be to destroy or render inefficacious the remedial purposes of the amendments enacted in 1906, it must follow that such construction can not be adopted, since to do so would compel us to hold that the wide and far-reaching remedies created by the amendments of 1906 were, in effect, destroyed by the narrower remedial processes which had been previously enacted in 1889. This conclusion being in reason impossible, it must follow that, construing the provisions of Section 10 in the light of and in harmony with the amendments adopted in 1906, the remedy afforded by that section, in the cases which it embraces, must be limited either to the performance of duties which are so plain and so independent of previous administrative action of the Commission as not to require a prerequisite exertion of power by that body, or to compelling the performance of duties which plainly rise from the obligatory force which the statute attaches to orders of the Commission, rendered within the lawful scope of its authority, until

such orders are set aside by the Commission or enjoined by the Courts."

In Atlantic Coast Line R. R. Co. et al vs. Macon Grocery Co. et al, supra, Circuit Court of Appeals, Judge McCormick rendering the opinion, held that the Interstate Commerce Commission, having been given exclusive jurisdiction in the first instance to determine the reasonableness of interstate rates by the Interstate Commerce Act, shippers cannot maintain a suit in equity to prevent the filing or enforcement of a schedule of rates or a change to unjust or unreasonable rates, pending determination of the reasonableness thereof by the Commission. Circuit Judge Pardee concurring, uses the following pertinent and significant language: "The initial regulation of interstate rates is placed by law in the hands of the Interstate Commerce Commission, and the Courts should not interfere to restrain, compel or regulate, except where invoked after final action by the Commission and in accordance with the rules prescribed in the laws regulating interstate commerce."

If the Tie Company had applied for a writ of mandamus to compel the Railroad Company to treat railroad cross ties as lumber and furnish cars and transport the ties under the lumber tariff, the above authority would have been directly in point as denying the power of the Circuit Court to award the writ. The Interstate Commerce Commission, acting, and assuming to act, under the authority conferred upon it by Section 6 of the Interstate Commerce Commission law, having prescribed how tariffs should be prepared, and having ordered that all commodity rates must be specific and must not be ap-

plied to analogous articles, the Court would not, in the absence of initial action thereon by the Interstate Commerce Commission, have undertaken to compel the railroad to apply the lumber rate to the analogous article of cross ties. The Court would have respected the action of the Interstate Commerce Commission for good reasons, one of which is, that not to do so, would result in a want of uniformity. It is just as important that the articles of transportation should be uniform and alike to all shippers, as it is that the rates shall be uniform and alike.

One of the principal objects of the Interstate Commerce Act, and the one that has received most favorable consideration by the Courts, is that all shippers shall be placed upon an exact equality. This equality cannot be maintained without some central or primary authority having the power, in all cases, where there is a substantial dispute or difference of opinion as to the traffic or the rates, to hear, investigate and determine such issues.

Admitting, for the purpose of this argument, that the evidence introduced in this cause is sufficient to authorize and justify the Court and jury to find that railroad cross ties are lumber within the meaning and usage of the lumber and railroad business, still the evidence was amply and abundantly sufficient to have authorized a different finding. One Court and jury, therefore, might find and decree that railroad cross ties are lumber, and award one shipper damages by reason of the failure of the railroad to so treat them, while the Interstate Commerce Commission or another Court and jury might deny such recovery, thus giving to one shipper an advantage over another There is just as much reason for avoiding discrimination between shippers as there is for avoiding dis-

crimination in rates that might be produced if the Courts were permitted to decide what is a reasonable rate, as pointed out and condemned in T. & P. Ry. Co. vs. Abilene Cotton Oil Co., supra. The only way to avoid it is to hold that the determination of the question is primarily for the Interstate Commerce Commission, and not for the Courts.

The able trial Judge submitted to the jury the question of whether railroad cross ties are lumber, which clearly indicate that it was his opinion that the evidence made an issue, and that the jury might be authorized to find either one way or the other. If, in his opinion, there had been no conflict in the evidence, that railroad cross ties were or were not lumber, the Court would have so held without submitting that issue to the jury. The presumption, therefore, is that a verdict finding that railroad cross ties were not lumber would have been approved by the Court.

Suppose, therefore, that some other shipper had had pending in the same Court a suit for damages against the M. K. & T. Ry. Co. for failure and refusal to furnish cars and transport cross ties as lumber for the rates named in a lumber tariff, and another jury had been empanelled and upon the evidence introduced in that case, had found that railroad cross ties were not lumber, and that the shipper in that case could not, therefore, recover damages by reason of his inability to have his cross ties transported from one State to another. We would then have the apt illustration of the inequalities and discriminations that would result from the Circuit Court undertaking to determine the issues in the two cases. No such discrimination would result if the determination of these issues should be by the Interstate Commerce Commission.

The plea of privilege of the Kansas City Southern Railway Co. to be sued in the district whereof it is an inhabitant was sustained by the court, and that defendant was dismissed out of the cause. Presuming, of course, that the Tie Company has confidence in its suit, it will doubtless, if it has not already done so, file suit against that defendant in Kansas City, Missouri. Suppose a jury there should find that railroad cross ties are not lumber within the meaning and usage of the lumber and railroad business; and it is not improbable, in view of the overwhelming weight of the evidence in favor of such a finding, that such would be the verdict of the jury. In such event ~~that~~ railroad would be condemned, while another one, similarly situated, would be justified in doing the same thing. It was never the purpose of the law to permit or suffer such a discrimination.

The courts, therefore, have wisely held, as we understand the decisions, that in all cases where a court and jury or Inter-State Commerce Commission might find the facts differently, and where the difference in the findings of facts would result in a want of uniformity and discrimination between shippers, the determination of such issues is not for the courts, but is primarily for the Interstate Commerce Commission.

To hold that the commodity rates named in a tariff for the interstate transportation of lumber may be applied to the analogous article of hewn railroad cross ties, the ruling of the Interstate Commerce Commission must be ignored. If the courts ignored that ruling when a suit is filed in such courts, and the Interstate Commerce Commission adheres to such ruling when complaint is made before it, the necessary results would be the want of uniformity, and

discrimination between shippers would follow; the very thing which the Interstate Commerce law undertakes to avoid.

The Pitcarn Coal Co. and the Macon Grocery Company cases were proceedings in equity, it is true, but we see no reason why the reasons given for holding the Circuit Court to be without power to determine the issues without reference to the Interstate Commerce Commission should not be equally applicable to a suit for damages, such as this, and we submit that it has been so held by the Circuit Court of Appeals of the Third Circuit.

In Morrisdale Coal Co. vs. Pennsylvania R. R. Co., 183 Fed. Rep., 929, the coal company sued the railroad for damages for alleged discrimination in the matter of the distribution of coal cars amongst the mines of the Clearfield coal region of Pennsylvania and the mines of other coal regions. It was claimed that in the distribution of these cars, an undue and unreasonable preference and advantage was given to the mines in other coal regions to the disadvantage of plaintiff. The action was dismissed by the Circuit Court for want of jurisdiction, the court basing its judgment on its understanding of the interpretation of the act to regulate commerce by the United States Supreme Court in Railways vs. Abilene Cotton Oil Co., 204 U. S., 426.

In the Abilene case, the opinion of the court dealt with the rule of procedure for the recovery of damages in case of an unreasonable rate, while in the Morrisdale Coal Co. case, the court dealt with the rule of procedure for redress in the case of an alleged unreasonable regulation for the distribution of cars. The court, in stating the issues for determination, states the second question as follows:

"Whether a distinction exists by reason of the fact that in the Abilene case, the rule complained of was one affecting rates, while in the present case it is one concerning the distribution of cars?" (p. 933).

In answering that question, the court says:

"We conclude, therefore, that if, except for the act to regulate commerce, the Morrisdale Coal Company would have had a common law right of action against the Pennsylvania R. R. Co. for the damages here claimed, that right was not merely suspended while the old rule of distribution was in operation, but was taken away for all time, and the coal company given a substituted right of procedure before the Commission, if at any time within one year after June 29, 1906, for the determination by the Commission of the question whether the rule complained of was discriminatory, unless, indeed, the Commission has no power under the act to determine whether a rule for the distribution of cars is discriminatory."

The court then discusses the opinion of the Supreme Court in Pitcarn Coal Co. case and in the case of Interstate Commerce Commission vs. Illinois Central R. R. Co., 215 U. S., 452, and reaches the conclusion that the Commission had such power, and that the Circuit Court was without jurisdiction to hear and determine the issues and award the relief prayed for in that cause.

At page 936, the court, referring to the above decisions of the Supreme Court, says:

"These cases conclusively establish the doctrine that the Interstate Commerce Commission alone has original jurisdiction to determine whether an existing rate, schedule, or an existing regulation or practice effecting rates or an existing regulation or practice of any other kind affecting matters sought to be regulated by the act, is unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, and that the courts cannot, by mandamus, injunction, or otherwise, control or modify any order of the Commission made by it in the due performance of its merely administrative functions."

Morrisdale Coal Co. vs. Penn. R. R. Co., 230 U. S., the court affirms the judgment of the Circuit Court of Appeals in the 183 Fed., 929, and after referring to facts and opinions in other cases, says:

"In view of the decision in the Abilene, Pitcairn, and Robinson cases it is unnecessary again to discuss the statute, or do more than say that in this case the plaintiff was not entitled to maintain its action without producing an order of the Commission that the rule adopted by the Pennsylvania Railroad was unreasonable.

The plaintiff, however, seeks to take the case out of the principle of those decisions, insisting that this is a suit for damages occasioned by a violation of the rule; and that, therefore, without any order of the Commission, it is entitled to institute a suit for the recovery of damages resulting from the failure to distribute cars according to the method established by the railroad itself. The record, however, does not sus-

tain this position, for the evidence does not show any breach of the rule or any failure to deliver to the Morrisdale Company all of the cars to which it was entitled under the method of allotment in force between 1900 and 1906. On the contrary, it was admitted at the hearing that there had been no discrimination against the plaintiff in the application of the rule, the complaint being that the basis of allotment was unreasonable, and that all cars in the district should be distributed according to the capacity of the mine, without deducting private cars, foreign fuel cars, or the carrier's own fuel cars. Whether this should be done as a general rule, or under the peculiar conditions prevailing on defendant's road at that time, was, as we have seen, an administrative question, and to be decided by the Commission as preliminary to the right to maintain this suit. The circuit court rightly held that until this was done it had no jurisdiction as a Federal Court of the cause of action sought to be enforced."

In Southern Railway Co. vs. Reid, 222 U. S., 424, the defendant in error had recovered a judgment against the plaintiff in error for $25 damages and a statutory penalty for the refusal of the railroad company to receive and execute a bill of lading and transport certain household goods from Charlotte, North Carolina, to a point in West Virginia. The railroad justified its refusal to receive the goods for transportation in interstate commerce, because no through and joint rate of freight had been established and filed with the Interstate Commerce Commission covering the shipment between said points.

Judgment was, however, rendered against the road and affirmed by the Supreme Court of North Carolina, which judgment was reversed by this court on the ground that Congress, by enacting the Interstate Commerce Law, had exclusively occupied the field, in so far as interstate transportation is concerned, and that, therefore, the statute of North Carolina could have no application. However, in discussing the subject, Mr. Justice McKenna says:

> "The Commission is given the power to determine and prescribe the manner in which the schedules required by the act are to be kept. And it is enacted that unless otherwise provided, no carrier 'shall engage or participate in the transportation of passenger or property, as defined in this Act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and publishel in accordance with the provisions of this act.'
>
> "It is evident, therefore, that Congress has taken control of the subject of rate-making and charging. All of the particular details we cannot set forth without extensive quotation from the act, which it is quite inconvenient to make. The provisions of the act are directed at the abuses most to be feared,—unreasonableness in the rates and discriminations, including in the latter, discriminations in service, in the acceptance and delivery of freight and in facilities furnished."

In Mitchell C. & C. Co. vs. Penn. R. R. Co., 230 U. S., ——, the Court says:

> "The necessity under the statute of having

such questions settled by a single tribunal in order to secure singleness of practice and uniformity of rate has been pointed out and settled in Abilene, Pitcairn and Robinson cases, and is referred to here because this record and that in Pennsylvania R. Co. vs. International Coal Mining Co., just decided, 229 U. S., ——, furnish a striking illustration of the results which would follow if the reasonableness of an allowance could be decided by different tribunals. Both cases involve the payment of 18 cents a ton to the Altoona Company during the same period and for identically the same reasons. In both the plaintiff insisted that the payment was a rebate, and the carrier that it was compensation for services rendered. In the International case the judge treated the Altoona allowance as lawful and reasonable. In this case the referee found that it was a rebate, while the trial judge, in passing on exceptions to the report, held that it was a question of fact about which the evidence was conflicting, and thereupon approved the referee's report. Treating it as a question of fact, there may have been sufficient testimony to sustain the finding in both instances, although the conclusion was diametrically opposite. And, applying the rule that appellate courts will not disturb findings of fact where the evidence is conflicting, contradictory judgments might have been affirmed, and one plaintiff could have been awarded damages on the theory that the Altoona allowance was unlawful, and the other been mulcted in cost because the Altoona allowance was legal. This and like considerations compelled the holding that, as the courts have no pri-

mary jurisdiction to fix rates, neither can they do so at the suit of a single plaintiff who claims to have been damaged because an allowance paid its competitors was unreasonable in amount."

If, in the opinion of the Interstate Commerce Commission, it would have been lawful to transport the oak cross ties on the rate applying to oak lumber, it certainly would have said so when the plaintiff in error applied to it for permission to amend its tariff so as to allow it to do so. The Commission was in possession of all the facts, in fact, was calling on the railroad company to afford relief. Therefore, if the Commission had thought it was legal to do so, it doubtless would have said to the railroad company: "It is not necessary for you to amend your tariff to transport these cross ties,—transport them on the lumber rate already on file with the Commission." It did not say so, however, but, on the contrary, required the tariffs to be filed in due form and for the statutory time before becoming effective. In the letter from Commissioner Clark of January 17, 1908, after justifying the refusal of the Commission to permit the amendment of the tariff so as to include oak railroad cross ties, he says:

"We are willing to grant such permissions in specific instances as you may find it necessary to request in order to make your lumber rates include ties; the idea being to have ties take the same rates as lumber manufactured from the same wood." (Rec., p. 110.)

II.

At the close of the testimony the plaintiff in error requested the court to instruct the jury to return a verdict in its favor, because at the times the ties were tendered for transportation to Linwood, Kansas, the plaintiff in error did not have on file with the Interstate Commerce Commission a tariff of rates upon which such cross ties could lawfully have been transported. (Rec., p. 223.)

Section 6 of the Interstate Commerce Act, as amended June 29, 1906, became effective sixty days after passage, and for the first time made it unlawful for a common carrier to engage or participate in the transportation of property unless the rates, fares and charges upon which the same are transported have been filed and published in accordance with the provisions of the act. Said section also provides:

> "That every common carrier subject to the provisions of this Act shall file with the Commission, and print and keep open to public inspection, schedules showing the rates, fares and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water, when a through route and joint rate has been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares and charges applied to the through transportation.

> The schedules printed as aforesaid shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force."

The Western Classification, I. C. C. No. 1, issued and effective October 1, 1907, provides as follows: "Ties, railroad (wood). Subject to regulations and rates in tariffs of the individual carriers.")Rec., p. 132.)

Prior to the amendments of 1906, commonly known as the Hepburn Act, there was no law that prohibited carriers from transporting commodities without having on file with the Interstate Commerce Commission specific rates applying thereto. And prior to that amendment, it would not have been unlawful for the plaintiff in error to have transported the cross ties of the defendant in error from points on its line in Louisiana and over connecting lines of railroad to Linwood, in Kansas. After said amendment, however, it became unlawful for it to do so, and the record shows that as fast as occasions arose, it endeavored, in good faith, to obey the law by filing additional tariffs of rates covering commodities offered for transportation upon which it then had no rates in effect. And when this controversy arose, it undertook to file a joint through tariff rate on oak railroad cross ties, effective in five days. The Interstate Commerce Commission being then fully advised of the situation of the defendant in error, and the tariff of rates then on file, and having undertaken, in an informal way, to use its good offices in behalf of the defendant in error, refused to permit the rate on oak railroad cross ties to become effective in less than thirty days, notwith-

standing the fact it was advised that the new rate was for the purpose of enabling the defendant in error to have its cross ties lawfully transported.

Now, we submit that if, in the opinion of the Interstate Commerce Commission, it would have been lawful for the plaintiff in error to have transported, or participated in the transportation of the cross ties in question, under rates then on file with the Commission, it would have said so. The correspondence between the General Freight Agent of the plaintiff in error and the Interstate Commerce Commission shows that the Commission, in this matter, adhered strictly to its requirement, that commodity rates must be specific, and must not be applied to analogous articles.

In United States vs. Illinois Terminal Ry. Co., 168 Fed., 548, the court says:

"By the amendment of June 29, 1906, Section 6, of the Act to regulate commerce was re-written and still further strengthened. The transportation of passengers or property in interstate commerce by any carrier which has not filed its rates in accordance with the Act was made unlawful. The Elkins Act, at the same time, was also amended by addition of the penalty of imprisonment for individuals.

"Prior to the Act of June 29, 1906, such a prosecution as this could not have been maintained. Before that time the act made failure to file rates with the Commission at Washington an offense, but did not provide that transportation without filing rates should also be an offense. Under the old law, therefore, it has been decided that the prosecution for failure to

> file could be brought only in the District of Columbia, where the office of the Commission is situated. By the amendment, however, the prosecution for transporting when rates are not filed may well be brought in any district through which the transportation passes."

Section 6 of the Hepburn Act requires the rates, schedules and tariffs of joint through rates to be filed only when they have been established. The Act does not require carriers to establish joint through rates over their own lines and connecting lines, but the Act does elsewhere empower the Interstate Commerce Commission to do so in certain instances.

In Southern Pacific Ry. Co. vs. Interstate Commerce Commission, 200 U. S., 552, this court says:

> "It is conceded that the different railroads forming a continuous line of road are free to adopt or refuse to adopt joint through tariff rates. The commerce act recognizes such right, and provides for the filing, with the Commission, of the through tariff rates as agreed upon between the companies. The whole question of joint through tariff rates, under the provisions of the act, is one of agreement between the companies and they may, or may not, as they may think their interests demand. And it is equally plain that an initial carrier may agree upon joint through rates with one or several connecting carriers, who, between each other, might be regarded as competing roads."

It is not claimed by the defendant in error that the plaintiff in error had wrongfully or otherwise

failed or refused to establish a joint through rate on oak railroad cross ties from points in Louisiana and Arkansas to Linwood, Kansas. In fact, the only allegation made by the defendant in error, is that the plaintiff in error had filed with the Interstate Commerce Commission T. & P. Joint Through Tariff No. 8500-H on the 23rd day of May, 1901, showing the rates for the transportation of oak lumber from points in Louisiana and Arkansas to Linwood, Kansas; and then further on in its petition, it alleges that oak cross ties are, in fact, oak lumber, and that such cross ties should have been transported under the lumber tariff, which included all lumber, except specified valuable woods, and therefore included oak lumber.

It is true that on the trial of the case the defendant in error sought to show that the plaintiff in error had treated railroad cross ties as lumber, by having at certain times engaged in their transportation. However, the evidence fails to show that since the enactment of the Hepburn Act, except through mistakes of local agents, the plaintiff in error has transported, or engaged in the transportation of, any cross ties without having in effect and on file with the Interstate Commerce Commission a rate upon the specific ties transported; and prior to the amendment to Section 6, 1906, it was not unlawful to apply rates on file with the Interstate Commerce Commission to analogous articles.

We submit, therefore, that the evidence utterly fails to show that the plaintiff in error had ever treated cross ties as lumber, but even if it had, such practice on its part could not have rendered ineffective of the requirement of the Interstate Commerce

Commission, that commodity rates must be specific and must not be applied to analogous articles.

The evidence shows that the plaintiff in error, and other railroads, as well as the Interstate Commerce Commission, believed that it was unlawful, after the passage of the Hepburn Act to transport any character of railroad cross ties between points in different states without first having on file with the Interstate Commerce Commission a rate applying to that specific commodity. Therefore, when pine cross ties or cypress, or gum cross ties were tendered for shipment, their transportation was refused until a tariff, showing the rates upon such specific ties could be filed with the Interstate Commerce Commission, and become effective.

While it is true that the Interstate Commerce Commission had theretofore expressed the opinion that the rates for the transportation of cross ties should not be higher than the rates for the transportation of lumber, it never did express the opinion, or in any manner hold, that cross ties are lumber, so as to make lawful the transportation of such cross ties on rates named in a lumber tariff.

In Howard Supply Co. vs. C. & O. R. R. Co., 162 Fed., 188, plaintiff sought to recover damages against the railroad for the difference between freight on cross ties from points in Kentucky to points in Pennsylvania in excess of the published rates on lumber between the same points. It was claimed that the Interstate Commerce Commission, in Reynolds vs. Railroad, in First I. I. C. C. Repts., 685, had ruled that rough lumber and cross ties could be classed alike, and that any charge on ties greater than that on rough lumber between the same points was, in

that case, excessive and unreasonable. The court, in answer to that contention, says:

> "I think it clear that the Interstate Commerce Act of February 4th, 1887, as amended June 29th, 1906, makes it clear that it was the intention of Congress that all parties claiming to be aggrieved by violations of the Interstate Commerce Acts by common carriers must first make application to the Commission for an award of damages against the offending carrier, and afterwards apply to the courts for the enforcement of the order of the Commission."

Through Tariff T. & P. No. 8500-H, in giving a list of articles upon which the lumber rate would apply, names a number of articles, but does not include railroad cross ties. In 1907, when pine and cypress cross ties were tendered for interstate shipment plaintiff in error amended its tariff so as to make the lumber rate apply to such pine and cypress ties before transporting them, and it attempted to file and make effective, in less than thirty days, a tariff showing the rates on oak railroad cross ties (all wood ties) from points in Louisiana and Arkansas to Linwood, Kansas, in less than thirty days, in order to take care of the ties of the defendant in error. The Interstate Commerce Commission refused permission to make a tariff effective in less than thirty days, but required the plaintiff in error to file its tariff in due course, and the same became effective on February 16th, 1908.

It was shown without contradiction that since the passage of the Hepburn Act whenever railroad companies engaged in the transportation of cross ties,

they published and filed with the Interstate Commerce Commission a tariff, naming the rates upon the specific character of ties to be transported. All this shows that the railroads, as well as the Interstate Commerce Commission regarded oak railroad cross ties as distinct and different from oak lumber, as wagon spokes, axe handles, and similar articles. Besides, we know of no authority that holds that oak cross ties are oak lumber, or that under the present law, a common carrier can transport in interstate commerce hewn oak railroad cross ties on a tariff showing the rates on oak lumber, except the holding of the Circuit Court of Appeals of the Fifth Circuit in this case, and it cites no authority in support thereof. (Rec., p. 239.)

In Greason et al. vs. St. L. I. M. & S. Ry. Co., 86 S. W., 722, the identical question now before this court was determined. It was there claimed that cross ties are lumber, but that contention was denied by the court.

Greason and others were engaged in the shipping of lumber, ties and piling from Poplar Bluff, Missouri, to Peoria, Illinois, through East St. Louis, Illinois. They applied to the Iron Mountain Railroad Company to know the rate on lumber from Poplar Bluff, Missouri, to Peoria, Illinois, and were informed by the officials of the Iron Mountain Railroad Company that they would protect a rate of ten cents per hundred pounds from Poplar Bluff, Missouri, to East St. Louis, Illinois. The essential dispute in that case was as to whether the letter from defendant's general freight agent quoting a rate for hauling lumber constituted an agreement on the part of the defendant to carry cross ties at the same rate; that is, were hewn cross ties "lumber" within the

meaning of defendant's agreement to transport lumber for ten cents per hundred weight.

Plaintiff Greason introduced in evidence a tariff issued by the railroad company, giving a list of articles taking the lumber rates, as follows:

> "Lumber rates will apply upon lumber, except walnut, butternut, cherry, and woods of value, and as otherwise provided, and also on the following articles, in straight or mixed C. L., minimum weight 30,000 pounds per car, except when car is loaded to full visible physical capacity, when actual weights will apply, subject to a minimum of 24,000 pounds."

Then follows a long list of articles, such as fence posts, base boards, handles, piles, etc. The tariff then named a rate on articles taking higher than lumber rates. The tariff introduced in evidence in that case was very similar to T. & P. Tariff No. 8500-H, introduced in evidence in this case.

The plaintiffs, Greason et al., next introduced the opinion of the Interstate Commerce Commission in the case of Reynolds vs. Railroad, First I. C. C. Rep., 303, decided in 1888. The effect of the decision in that case is that the rates on ties should not be made higher than the rates on lumber. It was also shown that the railroads in making and filing their tariffs, treated cross ties as a specific commodity, different to lumber, and taking a higher rate.

The trial court submitted to the jury whether or not hewn switch ties were included in the general definition of lumber, and whether or not switch ties were included in the classification of lumber named in the tariffs of the railroad company. In the beginning of the opinion, the court says:

"It will be observed from the foregoing statement that the plaintiffs declared on a supposed agreement by the defendant contained in the latter dated January 20th, 1902, to transport switch ties from Harveill and Poplar Bluff to East St. Louis for ten cents a hundred weight. It is alleged that, relying on said agreement, plaintiffs shipped nineteen carloads of ties and were charged an excess above the rate mentioned, in violation of the agreement. The letter quoted a rate on lumber and not on ties. The solution of this case, therefore, depends upon what the defendant meant by the word 'lumber,' or rightly was understood by the plaintiffs to mean. * * * No decision has been cited that 'lumber' means hewn ties. If the word 'lumber' has any peculiar meaning among dealers in it or in transportation circles, which would embrace or exclude hewn ties, no evidence of the fact was offered. The meaning to be applied to the word in the letter in question is its ordinary meaning in vernacular speech, unless the previous dealings between plaintiff and defendant, or the circumstances under which the letter was written, or the light thrown on the intention of the letter by the other facts in evidence. The tariff sheet, and the testimony of the freight agent, compel a different significance. All this evidence was introduced by the plaintiffs, and they are in no position, therefore, to deny its truthfulness."

Further on in the same opinion, the court says:

"We have little doubt that switch ties, sawn or hewn, when hauled from one state to another,

ought to be carried at the same rate lumber is. The Interstate Commerce Commission decided as much in Reynolds vs. Railroad, supra. In saying what is a just classification of the articles for the purpose of fixing a scale of tranpsortation charges, the Commission has regard to comparative weights and values in proportion to dimensions, and holds that those articles which carry approximately the same value and weight with the same bulk ought, as a rule, to be hauled for the same freight rate. And when some article is not named on a railway tariff sheet among any of the different classes of freight for which different carriage rates are charged, it is classed with articles analogous to it in weight and value and takes their rate."

The above decision was rendered prior to the Hepburn Act, which made it unlawful for an interstate carrier to engage, or participate, in the transportation of property without first having a rate applying on that commodity on file with the Interstate Commerce Commission. Presumably that provision of Section 6 of the Hepburn Act was intended to break up the practice of applying the rates on file with the Interstate Commerce Commission to analogous articles. And that provision of the Interstate Commerce Commission is a wise one if all shippers are to be treated alike. Otherwise, there would doubtless be a difference of opinion between different railroad agents as to what were analogous articles. One might be of opinion that railroad cross ties were analogous to lumber, and charge a shipper lumber rates; another might be of opinion that railroad cross ties were not analogous to lumber, but

were analogous to some other article taking a higher rate, thus bringing about a want of uniformity, which Congress, in the enactment of the Interstate Commerce Act, has studiously attempted to prevent. If the carriers were permitted to omit from tariffs certain commodities and then transport such commodities at a rate that is charged for the transportation of analogous articles, it would undoubtedly result in the grossest discrimination between shippers. At least that might be the result.

In Armour Packing Co. vs. United States, 209 U. S., 56, this court says:

> "The Elkins Act proceeded on broad lines, and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published and posted as required by law."

This purpose is even more apparent in the Hepburn Act, 1906, which provides that no carrier shall engage, or participate, in the transportation of property without first having on file with the Interstate Commerce Commission a schedule or tariff of the rates upon that commodity, and further confers upon the Interstate Commerce Commission the authority to prescribe how these schedules and tariffs should be prepared and made up for filing. The plain intention of Congress was to close every avenue against discrimination.

In Mugg & Dryden vs. T. & P. Ry. Co., 202 U. S., 242, this court held that although a railroad agent

might quote and guarantee a rate less than the published rate on file with the Interstate Commerce Commission, and although the shipper might rely upon such quotation and guarantee, nevertheless he will be required to pay the rate named in the tariffs on file. Otherwise the agent of the railroad company, by making mistakes, could give one shipper an advantage as to rates over another, and the recovery of damages would be equal to a rebate. That opinion also establishes the rule, that the shipper must himself look to the tariffs on file with the Interstate Commerce Commission, and not rely upon the representations or conduct of railroad agents.

When the defendant in error was preparing to make a contract to ship oak cross ties, it applied to the agent of the plaintiff in error for a tariff on lumber. The agent did not know that the defendant in error was about to embark in the business of dealing in cross ties. As soon as any official or authorized agent of the railroad company had their attention called to the fact that defendant in error was beginning, or claiming, the right to ship oak cross ties to Linwood, Kansas, they promptly informed it that there was no tariff on file with the Interstate Commerce Commission, showing the rates on such commodity, and that before any shipments could be accepted, a rate would have to be prepared, published and filed. The plaintiff in error evinced a desire to obey the law, and we submit, rightfully, refused to do what it believed would be a violation of the law.

III.

The court erred in overruling defendant's requested special instruction no. 3, as follows:

"Gentlemen of the Jury: If you believe from the evidence that the Union Pacific Railway Company was informed and knew that the plaintiff was unable to, and that it failed to ship and deliver to said railroad 15,000 ties in October and 15,000 during November, 1907; and if you further believe from the evidence that said railroad company did not promptly, on coming into possession of such knowledge, if any, cancel and terminate the contract described in plaintiff's petition and give notice thereof to plaintiff; and if you find from the evidence that on or about December 5th, 1907, plaintiff resumed the shipments and deliveries of ties to said railroad company and that it was then in a position and able to continue its deliveries of ties so as to complete the contract within the ten months from October 1, 1907, and if you further find from the evidence that afterwards, with a full knowledge of the foregoing, if you find it had such knowledge, the Union Pacific Railroad recognized and acknowledged the continued existence of said contract and agreed to still carry out and be bound by the terms thereof, then I charge you that said railroad did not have the legal right to cancel said contract, and if you believe from the evidence that without further default, knowledge or consent of defendant, the Union Pacific Railroad, with or without the consent of plaintiff, cancelled said contract and refused to take and pay for further ties under the same, then I charge you that plaintiff cannot recover and you will return a verdict for the defendant." (Rec., p. 231.)

The court erred in refusing defendant's requested special instruction No. 6, as follows:

> "Gentlemen of the Jury: You are instructed that if you find and believe from the evidence that the plaintiff, American Tie & Timber Company, Limited, consented to the cancellation of its contract by the Union Pacific Railway Company, then you will find for the defendant." (Rec., p. 231.)

Special instruction No. 3 was asked and refused by the trial court. (Rec., p. 225.)

Special instruction No. 6 was asked and refused by the trial court. (Rec., p. 226.)

Statement of Evidence on the Issues Raised by the Foregoing Instructions.

On December 5, 1907, the Kansas City Southern Ry. Co.'s tariff naming a rate of 23 cents per hundred weight, from points via Louisiana and Arkansas to Kansas City, became effective. (Rec., pp. 135 and 136.)

J. W. Griffith, a witness for the defendant, testified by deposition as follows:

Q. What is your name?

A. J. W. Griffith.

Q. What business are you engaged in?

A. I am purchasing agent for the Union Pacific Railroad Company.

Q. Did you, as purchasing agent of the Union Pacific Railroad Company, make a contract with the American Tie & Timber Company, Limited,

about July 23, 1907, for certain railroad cross ties?

A. I did.

Q. Was the contract in writing?

A. It was in writing.

Q. Did the Union Pacific Railroad Company receive any cross ties under that contract?

A. It did.

Q. Will you please give the number of ties received under the said contract, the dates of the shipments and the amount of each shipment?

A. We received ties as follows, the dates being those given in shipper's bill:

In October, 1907, 4150 first-class; 300 second-class.

In December, 1907, 6840 first-class; 1803 second-class.

In January, 1908, 700 first-class. Total, 11,690 first-class; 2103 second-class.

Q. Please give the dates and amounts of the shipments made during December, 1907?

A. The shipments in December, 1907, the dates being the dates on the shipper's invoices, were:

December 6, five cars	1,725 ties
December 11, six cars	1,755 ties
December 13, six cars	2,220 ties
December 14, one car	364 ties
December 16, three cars ...	904 ties
December 17, one car	350 ties
December 21, four cars ...	1,325 ties
Total	8,643 ties

Q. Did the Union Pacific Railroad Company receive any ties on the contract above referred to during the month of November, 1907?

A. Our records show that no invoices dated in November were received for ties.

Q. Did you receive a letter from the American Tie and Timber Company, Limited, dated December 7, 1907, in regard to the contract above referred to and the shipment of ties?

A. I did.

Q. Will you please produce and hand to the reporter to be identified as "Exhibit A" and attached to your deposition, a copy of said letter and state whether or not the same is a true copy of the original letter?

A. I herewith offer a copy of the letter referred to which is a true copy of the original with the exception of the printed letter head:

"Ex. A.

Shreveport, La., Dec. 7th, 1907.

Mr. J. W. Griffith,

Purchasing Agent, Union Pacific R. R. Co.,

Omaha, Neb.

Dear Sir:—Referring to the contract for 150,000 white oak cross ties we made with you: We have about gotten the rate and car question settled with the lines on which we are getting the ties and now have something over 75,000 ready for shipment, but we find that the ordinary tie man makes, at least, 15 per cent No. 2 ties, and we are almost forced to take them as all the other tie contractors do.

In your contract you limit us to 5 per cent No. 2, and if it is not asking much, would you not accept a larger percentage of No. 2 ties or allow us to ship them to you at the same price independent of the contract?

Yours truly,

AMERICAN TIE & TIMBER CO., LTD.,

By J. J. Marshall, Manager."

Q. Did you reply to that letter?

A. Yes, sir.

Q. On what date?

A. On December 11, 1907.

Q. Will you please produce and hand to the reporter, to be identified as "Exhibit B" and attached to your deposition, a copy of said letter and state whether or not that is a true copy of the original letter referred to?

A. I hereby present a copy of the letter referred to, of date December 11, which is a true copy of the letter sent to the American Tie & Timber Co, Limited.

"Ex. B.

Subject: Acceptance of No. 2 Ties.

Dec. 11, 1907.

American Tie & Timber Co., Ltd., Mr. J. J. Marshall, Manager, Shreveport, La.

Dear Sir: Answering your letter of the 7th inst., beg to advise that I would not be willing to accept more than 5 per cent No. 2 ties. We do not want any, and the 5 per cent which we agreed to accept must be the limit.

Yours truly,

J. W. GRIFFITH,
Purchasing Agent."

Q. Did you or not on or about December 17th, 1907, write and send to the plaintiff in this case another letter?

A. I did.

Q. Will you please produce and hand to the reporter, to be identified as "Exhibit C" and attached to your deposition, a copy of said letter and state

whether or not that is a true copy of the original letter referred to?

A. I hereby present a copy of the letter of December 17, 1907, to the American Tie & Timber Company, which is a true copy of the original letter sent them:

"Ex. C.

Subject: Cancellation of Tie Contract.

Dec. 17, 1907.

American Tie & Timber Co., Mr. J. J. Marshall, Manager, Shreveport, La.

Dear Sir: Referring to contract with your company, dated July 23, 1907, for 150,000 white oak cross ties, 'delivery to commence on or before October 1, 1907, and continue at the rate of 15,000 ties per month until deliveries are completed,' according to my records you have shipped to date, including bills received yesterday, 7,336 ties, which as you know, is not a specific fulfillment of the contract, and the contract is void on that account.

Since that contract was made we have received hundreds of thousands of cross ties on other contracts, and now have on hand our entire requirements of cross ties for the year 1908. This letter is to notify you that we do not require the ties remaining due on your contract, that we are unable to accept same and you are requested to discontinue shipments.

Yours truly,

J. W. GRIFFITH,
Purchasing Agent.

CC. to J.H.S
E.C.C.

Q. How were the letters of December 11 and 17 transmitted?

A. They were transmitted by United States mail.

Q. Were you or were you not acting for the Union Pacific Railroad Company in writing the above mentioned letters?

A. I was.

Q. Please state whether or not the Union Pacific Railroad Company needed and desired to obtain the cross ties mentioned in the contract hereinbefore referred to at the time the said contract was made?

Mr. Rodgers: We object.

The Court: It is immaterial.

The defendant excepts.

Q. How was it on December 17, 1907; that is, did or did not the Union Pacific Railroad Company need or want the ties mentioned in the contract referred to?

Mr. Rodgers: We object.

The Court: I sustain the objection; it is immaterial.

To which ruling of the court the defendant excepted.

Q. Please state whether or not your letter of December 17, above referred to gives the reason for cancelling the contract.

A. The letter referred to does give the reason for cancelling the contract.

Q. Did you have any conversation with a representative or representatives of the plaintiff in this case concerning the cancellation of the contract, and if so, with whom, and state as near as you can the substance of the conversation?

A. From a letter written on December 17, to the American Tie & Timber Company, I note that Mr.

J. J. Marshall, representing that company had called on me and interviewed me on that date, but I am unable to state the substance of that interview.

Q. Did he make any objection or protest against the cancellation of the contract above referred to?

Mr. Rodgers: We object; we were not required to make protest. Here is a letter that says the contract is cancelled and gives the reason.

The Court: I permitted the manager of the plaintiff company to testify that he tried or made efforts to prevent the cancellation. I will permit the question.

To which ruling of the Court the plaintiff excepted.

A. He made no protest against our legal right to cancel the contract. I cannot exactly recall the substance of our conversation, but he evidently acquiesced in the cancellation of the contract, requesting only that we take about twenty cars of ties which he claimed to have under load at that time, and which I agreed to take.

Q. Please state what steps or action the Union Pacific Railroad Company was taking on or about December 17, with reference to receiving further shipments of crossties, and which such steps or actions were being taken?

Mr. Rodgers: We object.

The Court: I sustain the objection.

To which ruling of the Court the defendant excepted.

A. Yes, sir; it is a fact. (Rec. p. 87-90.)

J. J. Marshall, recalled by the defendant, testified as follows:

(By Mr. Glass:)

Q. Mr. Marshall, you testified in this case before as a witness on the former trial?

A. Yes, sir.

Q. Did you testify—this question was propounded to you:

"Q. December 17 you received a letter from Mr. Griffith, the purchasing agent, stating they would cancel the contract."

A. Yes.

"Q. This is the letter (hands witness letter)? (Dec. 17th, 1907.)

"A. Yes, sir; that is the letter.

"Q. Did you cease to ship ties then?

"A. I explained to Mr. Griffith in person that we had some twenty or thirty cars we were ready—I was in Omaha when he handed me that letter; I told him we had twenty or thirty cars his inspectors had inspected and wished to send them in and he rescinded that that far that we might ship what we had now loaded; not to exceed twenty cars."

A. That is virtually my testimony and it is a fact.

Q. You shipped these?

A. Yes, and then stopped.

Q. You didn't make any demand—these ties?

A. No, sir. I didn't think I had a right to.

Q. You remember you testified to that?

A. Yes, sir; that is virtually my testimony

Cross-examined.

(By Mr. Rodgers.)

Q. The contract was cancelled by Mr. Griffith?

A. Yes, sir.

Q. You explained and he permitted you to ship about twenty cars the inspectors had already taken and you had loaded?

A. Yes, not exceeding twenty cars, was the agreement.

Q. With reference—when you say "rescinded" you mean he opened up the contract, or did he just rescind——

A. His statement was that he would take no more, but upon my statement he agreed to take what we had already loaded.

Q. The contract was cancelled?

A. Yes, sir.

REMARKS.

The defendant in error entered into contract with the Union Pacific Railroad Company to furnish it 150,000 cross ties, delivery to begin in October and end within ten months from October first. It made no inquiries of the railroad companies as to what the rate was on crossties, or whether they had any rate on ties. It assumed that the rate named in the lumber tariff would apply.

Along in October the defendant in error applied for cars in which to load and ship the ties, and was informed by the Kansas City Southern Railway and the plaintiff in error that they had no joint through rates on cross ties on file with the Interstate Commerce Commission, and that therefore it would be unlawful to transport, or participate in the transportation of the ties. Ninety thousand of the ties were to be shipped from points on the Kansas City Southern, and sixty thousand from points on the Texas & Pacific.

The Kansas City Southern at once set to work to prepare, have printed and filed a tariff under which the cross ties could be shipped from points in Louisiana and Arkansas to Kansas City, a point on the

Union Pacific Railroad about eighteen or twenty miles from Linwood, at the rate of 23 cents per hundred weight, and this tariff became effective December 5, 1907. This rate of 23 cents applied to Kansas City, where the ties were delivered to the Union Pacific Railroad, near Linwood, and was satisfactory to the defendant in error and the Union Pacific Railroad Company, so far as the evidence shows. No complaint seems to have been made and the Tie Company commenced shipping ties, and the Union Pacific Railroad Company commenced to receive them immediately after this tariff went into effect.

At that time that Tie Company had enough ties along the line of the Kansas City Southern to have continued shipping at the rate of 15,000 ties per month or more for at least four months.

The plaintiff in error had agreed to and in fact did put in a joint through rate on oak railroad cross ties from points in Louisiana and Arkansas to points in Kansas, and which became effective February 16, 1908.

The defendant in error kept the Union Pacific Railroad Company advised of what was being done all the time, and the Union Pacific Railroad Company knew that the Tie Company was going ahead getting out cross ties and placing them along the line of the railroad for the purpose of completing said contract as soon as the tariffs could be filed and become effective. During all this time the Union Pacific Railroad Company never gave any intimation that it would refuse to accept the ties.

On December 6th, the Tie Company applied to the Union Railroad Company for permission to modify the contract so that it could furnish 15 per cent instead of 5 per cent, as specified in the contract. On

December 11, 1907, the Union Pacific Railroad Company replied to that letter, and declined to allow the modification or change in the contract.

At that time the Tie Company was in a position to carry out its contract and make the entire delivery within ten months from October 1, 1907. No intimation was then given by the Union Pacific Railroad Company that it would decline to accept the ties.

Later, on December 17th, the Union Pacific Railroad Company notified the defendant in error that it had all the ties it needed and directed that defendant in error ship no more.

On the same day, December 17th, the manager of the defendant in error called on the purchasing agent of the Union Pacific Railroad Company, and they talked over the situation as to the cancellation of the contract, and defendant in error made no objection or protest, but acquiesced in its cancellation, provided the Union Pacific Railroad Company would accept twenty cars then loaded. (Rec. p. 218.)

The only reason that the Union Pacific Railroad Company had for the cancelling the contract was the failure to ship the 15,000 ties during the months of October and November. (Rec. p. 90.)

However, the Union Pacific Railroad Company had full knowledge of the failure of the Tie Company to ship 15,000 ties during each of the months of October and November; and the reason of its failure was also known to the Union Pacific Railroad Company. It knew that the defendant in error was still getting out ties on that contract, and that shipments would be resumed as soon as the tariff of rates could be filed and become effective. It knew that beginning with December 5th, the Tie Company was in

a position to fully carry out its contract and complete the same within the ten months contemplated by the contract. It afterwards, with full knowledge of all the facts, recognized the continuance of the contract and refused to allow it to be modified or changed.

There was ample evidence to warrant the jury in finding that the cancellation of the contract by the Union Pacific Railroad Company was wrongful, and for finding that the Tie Company agreed to the cancellation when it was in a position to have fulfilled the contract and to have compelled the Union Pacific Railroad Company to pay for the ties.

Under such circumstances, we insist that the defendant in error had no right to agree to the cancellation of the contract, but that its only rights, so far as the plaintiff in error was concerned, was to recover whatever damages, if any, it had suffered by reason of the failure to make the shipments during the months of October and November. It had no right to voluntarily cancel the contract and lose the sale of the cross ties and make the railroad company responsible for the entire resulting damages.

In K. C. B. & N. Co., 149 Fed. Rep., 360, Circuit Court of Appeals of the Eighth Circuit, Circuit Judge Sanborn delivering the opinion, the court says:

> "Counsel insist, however, that the purchaser had the right to refuse to take the articles in the last four carloads regardless of their presumptive character, because the goods furnished by the plaintiff in its first deliveries were not in accordance with the terms of the contract, and in support of the proposition they cite Norrington vs. Wright, 115 U. S., 188 (and other authori-

ties) and other cases of like character. The decisions in these cases hold that, where the vendor is required by an entire contract, as in the case at bar, to make successive deliveries of the articles sold, and the first deliveries fail to comply with the terms of the agreement either in the quality or quantity of the goods or in the times or places of delivery, the vendee by prompt notice of his refusal to further perform upon the discovery of the failure may relieve himself from liability for subsequent deliveries. This, however, is not his only remedy. He had the option, upon the discovery of the seller's default to refuse to receive and pay for further deliveries, and thus to terminate the contract, or to permit its performance to proceed, and to rely upon his damages for the vendor's breach. But he may not delay his exercise of choice. Delay, vaccilation, silence, or the absence of an immediate notice that he will not further perform is an election by the vendee that the performance of the contract shall proceed, and that he will rely upon his claim against the vendor for damages for the breach and upon that claim alone, for his remedy. He is met here by the principle of estoppel, by the rule that he who by his acts or statements, or by his silence when he ought to speak out, intentially or negligently induces another to so act that he will sustain injury by the former's denial of his acts, statements, or silence or of their natural effect, is estopped to repudiate them. If he remains silent after he discovers the fault of the vendor, and permits him to incur the trouble and expense of the subsequent preparation and deliv-

ery of the contracted goods he is thereby estopped from claiming a release from his obligation to receive and pay for them on account of the defects in the earlier deliveries. Immediate notice to the vendor, upon the discovery of his default in their earlier deliveries, that the vendee will not further perform the contract, is an indispensable condition of the latter's release from his liability to accept and to pay for subsequent deliveries which comply with the terms of the agreement."

In Beck vs. Pauli, etc. & Co., 52 Fed., 700, the court says:

"It is a general principle governing the construction of contracts htat stipulations as to the time of their performance are not necessarily of their essence unless it clearly appears in the given case from the expressed stipulations of the contract or the nature of its subject matter that the parties intended performance within the time fixed in the contract to be a condition precedent to its enforcement, and where the intention of the parties does not so appear, performance shortly after the time limited on the part of either party will not justify a refusal to perform, by the party aggrieved, but his only remedy will be an action or counter-claim for the damages he has sustained from the breach of the stipulations."

In Chouse vs. Doane, 21 So. Rep., 807, the second syllable is as follows:

"Although time may be made of the essence of a contract, yet if the party to whose benefit

such provision inures, subsequent to the time when a forfeiture would occur under such provision, by deliberate act recognized the contract as still subsisting, such conduct, will amount to a waiver of such forfeiture on his part."

In Lapsley vs. Howard, 119 Mo., 489, the court says:

"Even if the time for the payment of the $750 had been limited to twenty days after the sale of the lot to Baker as stated by Winter & Co., in their letter to him, yet some months after the twenty days had expired, as shown by that letter, Winter & Co. recognized the existence of the contract, which, together with the continuation of the parties to thereafter treat it as still existing, amounted to a waiver as to the time in which the money was to have been paid."

It was certainly an issue, made by the evidence, in this case whether the Union Pacific Railroad Company wrongfully breached the contract and caused the damages, or whether the Tie Company, by its own voluntary act agreed to its cancellation and thereby caused its damages, but said issues were ignored in the main charge, and the above requested charges were refused. We submit, therefore, that the Railroad Company was entitled to have such issues determined by the jury and the refusal of the court to submit them is error, requiring a reversal of the judgment.

IV.

The Seventeenth and Eighteenth errors assigned attacked the verdict in the trial court as being ex-

cessive, on the ground that under the pleadings and the evidence, viewed in the most favorable light to the defendant in error, it was not entitled to recover a sum in excess of $13,581.45, and that therefore the verdict for $17,112.23 is excessive in the sum of $3,530.78. That under the pleadings, the defendant in error was not entitled to recover more than $13,581.45.

The defendant in error claims, by Paragraph Five of its petition, that on 44,541 cross ties, which it had put out on the railroad of the plaintiff in error, and which it was not permitted to ship, it sustained a loss of $10,572.67. (Rec. p. 5-6.)

Of course, it could not recover more on that lot of ties than was claimed in its petition. It never intended to ship more than 60,000 ties over the road of the plaintiff in error. Three cars were shipped, and therefore no damages were claimed on that account. Deduct the three cars, as done by Paragraph Seven of the petition, there were left 58,970 ties, which it desired to ship over the railroad of the plaintiff in error. On 44,451 of these ties it claimed to have sustained a loss of $10,572.67.

It was alleged that 14,429 of the ties that were intended to be shipped over the road of the plaintiff in error were never manufactured or placed on the road. On 95 per cent, or 13,707 of the last lot of ties, it claims it would have made a profit of 13.27 cents per tie, or $1,809.07 in the aggregate. On 5 per cent, or 722 of these ties, it claims it would have made 18.18 cents per tie, or an aggregate of $135.73. Thus, on the 14,429 ties, according to its claim, it would have made $1,944.80, which, added to the $10,572.70 claimed as a loss on the 44,541, makes the aggregate sum of $12,517.47. Six per cent interest on that

amount from January 1st, 1908, to May 12th, 1910, makes $1,063.98, which, added to the $12,517.47, makes $13,581.45, the total amount that the jury would have been justified in finding under the pleadings and evidence. However, the jury found a verdict for $17,112.23, which is $3,530.78 more than the defendant in error was entitled to under the pleadings and evidence.

The charge of the court allowed the jury to find in favor of the defendant in error whatever damages it suffered on the 44,451 cross ties, which, however, could not exceed the amount claimed in the petition, which was $10,572.67.

The court also permitted the jury to find what damages the defendant in error suffered by reason of its failure to ship the 14,429 cross ties, which had not been manufactured or placed upon the road, which, however, could not lawfully exceed the amount claimed in plaintiff's petition, which, as before shown, was 13.27 cents for first-class ties, and 18.18 cents on second-class ties.

While it is true that in Paragraph Seven of the petition, the defendant in error claimed a greater loss; in fact, claimed the loss of profits on the entire number of ties it intended to ship over the road of the plaintiff in error, the court, however, only allowed a recovery of the actual damages on the 44,541 ties and the anticipated profits on 14,429 ties.

If the rule that a plaintiff cannot recover more than he sues for is enforced in this case, we can see no escape from the conclusion that the verdict of the jury and the judgment of the court awarded excessive damages to the extent of $3,530.78.

V.

The Nineteenth Assignment of Error questions the correctness of the judgment awarding defendant in error $2,500 attorney's fees, because no amount was found or allowed by the jury as such attorney's fees. (Rec. p. 252.)

Section 8 of the Interstate Commerce Act provides that any common carrier subject to the provisions of the act, which shall omit to do any act, or matter, or thing required by the act, shall be liable to the person injured thereby for the full amount of damages sustained in consequence of such violation, together with a reasonable attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected part of the costs in the case.

The amount of the attorney's fee is not fixed by law, and the sole question to be determined under this assignment is whether or not, in a case tried before a jury, evidence of what would be a reasonable attorney's fee should be submitted to, and determined by the jury. Can the Court, without evidence, fix the amount of such fees?

Respectfully submitted with prayer that the cause be reversed and dismissed, or reversed and remanded for further proceedings, consistent with the opinion of this court.

HIRAM GLASS,
Solicitor for Plaintiff in Error.

W. L. HALL,
Of Counsel.

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No. 180.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

TEXAS & PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

AMERICAN TIE & TIMBER CO., LTD.,
DEFENDANT IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY OF PLAINTIFF IN ERROR TO BRIEF OF DEFENDANT IN ERROR.

HIRAM GLASS,
Solicitor for Plaintiff in Error.

E. L. STECK, PRINTING, BOOKBINDING, AUSTIN

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May it Please the Court:

Counsel for defendant in error, in his brief, has made certain statements that we do not think should go unchallenged.

On page 11 of his brief, he says that the lumber rate was being used and applied by the railway com-

pany on all shipments of cross ties by others than defendant in error without question, and that after the plaintiff in error discovered the scale of the operation of the defendant in error, it, for the first time, refused to accept cross ties for shipment to interstate points, and it is intimated that the contention, that railway cross ties are not lumber, is a mere subterfuge, and that they were always treated as lumber until this controversy arose. The record does not justify or sustain the charges.

The amendment to the Interstate Commerce Law, known as the Hepburn Act, passed June 29th, 1906, did not become effective until sixty days after that date. On August 28th, 1906, the joint through lumber tariff T. & P. No. 8500-H was amended by adding sawed pine and cypress ties to the list of articles taking lumber rates, as shown in the tariff. (Record, p. 131.)

This tariff was further amended, effective March 15th, 1907, by adding to the list of articles taking the lumber rate, pine cross ties and cypress cross ties, omitting the descriptive word "sawed." (Record, p. 131.)

Effective October 3rd, 1906, tariff J. B. No. 66-A, I. C. C. No. 1409, was re-issued, making a proportional rate of 18c per hundred on pine lumber, sawed pine cross ties and sapling pine poles for mining timbers from points in Texas, Louisiana, and Arkansas, to El Paso, Texas, when destined to points in Arizona and New Mexico. And on telephone poles the same proportional rate to El Paso was made when they were destined to points in the Republic of Mexico. (Record, p. 132.)

Effective June 27th, 1907, the same tariff was further amended, making a proportional rate of 18c per hundred pounds to El Paso, Texas, when destined to

points in Arizona and New Mexico on pine lumber, pine cross ties, sapling pine poles and mining timbers. (Record, p. 132.) And all shipments made from points in Louisiana to El Paso, Texas, and destined to points in Arizona, New Mexico and Mexico of pine ties, sapling pine poles for mining timbers were made on tariffs on file with the Interstate Commerce Commission, and all this occurred prior to the contract between the defendant in error and the Union Pacific Railroad Company, and long prior to the origination of this controversy.

Again, on page 28 of his brief, counsel quotes Mr. E. L. Sargent, General Freight Agent of the plaintiff in error, as saying that "In arriving at my opinion with reference to ties and lumber, I make a distinction as to whether the ties are sawed at a sawmill or hewn or made by hand. Unless it was made by a sawmill, even though the same stock and of the same size, they would not be classified as lumber. I think this is the reason oak railway cross ties made by hand are not included in the term, 'lumber.'"

This witness distinctly said that he would not consider everything made by a sawmill as lumber, and just as distinctly says that railroad cross ties are not lumber, whether made by a sawmill or not, because they are not classed as lumber. (Record, p. 123.) In other words, this witness made no distinctions between railroad cross ties, whether hewn or sawed. He gave it as his opinion that nothing was lumber, unless it was sawed in a sawmill, but he distinctly disclaimed that everything that was sawed in a sawmill was lumber. Wagon felloes are made in sawmills, but are not classed as lumber in railroad tariffs. In fact, a great many commodities, such as mining props, telegraph and telephone poles, etc., which might be embraced in the generic term "lum-

ber," are not so classified in railroad tariffs, which are required to be specific.

Counsel for defendant in error tries to make it appear that the plaintiff in error would have accepted and transported oak cross ties if they had been manufactured in a sawmill. That is entirely erroneous, and is not warranted by the record. He does not quote the questions propounded to, or the answers of, witnesses, but states his conclusions of the testimony, and in many instances his conclusions are unwarranted. There is nothing in the record to warrant the assertion that the plaintiff in error would have accepted and transported oak railroad cross ties without a rate applying on them, even though they had been manufactured in a sawmill.

Mr. Sargent's idea was that nothing not manufactured in a sawmill would be considered as lumber, but he distinctly states that everything manufactured in a sawmill was not lumber.

The question for determination is not, whether a commodity can be said to be embraced in a generic term, because if that were true, a railroad company could file a tariff stating the rates on forest products that would cover hundreds of articles without listing them at all. But that is just what the Interstate Commerce Commission expressly forbids.

The proof on the trial of this case was uncontradicted, that all of the railroads, about which there was any evidence at all, classified cross ties as a distinct commodity, and that that classification was approved by the Interstate Commerce Commission in allowing the tariffs to be filed and used.

The Western Classification treats railroad cross ties as a separate and distinct commodity.

On pages 36 and 38 of brief of defendant in error, counsel discusses the evidence of J. L. Logan, who

was in the lumber and tie business in Louisiana in 1906, and up to May, 1907. His principal business was shipping pine lumber and pine cross ties to points west of El Paso, Texas. He also shipped some mine timbers which he calls stulls. His ties and lumber were manufactured at the sawmill of D. G. Petty, and he was of the impression that the railroad had no specific rate applying on ties, but that they simply applied the lumber rate. However, as we have already shown, the railroad company, anticipating the coming into effect of the Hepburn Act, amended its tariff, effective August 28, 1906, so as to include sawed pine ties and mining timbers, telephone poles, etc., so that all the shipments made from Petty's mill in Louisiana to points beyond El Paso were covered by tariffs on file with the Interstate Commerce Commission at that time. It is true that Mr. Logan said that among the many hundred carloads of sawed pine ties, a few carloads of oak ties were transported during that time. These ties were all loaded into boxcars at the sawmill, where there was no railroad agent and depot, and there is no evidence that the plaintiff in error knew that such shipments were being made. In fact, the testimony is uncontradicted that the first notice that the plaintiff in error had that any oak cross ties were being offered for shipment, was the discovery that three carloads had been sent from stations in Arkansas, and the agents were immediately notified that no interstate shipments of such ties could be made until a tariff to cover was filed with the Interstate Commerce Commission.

It is true that on August 29, 1907, Mr. Sargent wrote the letter quoted on pages 49-51 of brief to the Secretary of the Interstate Commerce Commission, in which he demurred to putting in a low interstate rate on railroad cross ties, but there is nothing

in that letter to show or indicate that the railroad company had ever treated cross ties as lumber. On the contrary, railroad cross ties had always been regarded as a separate and distinct commodity from lumber.

Plaintiff in error was not bound to put in a joint through rate on cross ties over its line and connecting lines of road, as has been conclusively determined in Southern Pacific Ry. Co. versus I. C. C., 200 U. S., 552. Though the Interstate Commerce Commission might have done so since August, 1906.

When this case was tried the first time, the trial judge held, as a matter of law, that railroad cross ties were not lumber, and instructed a verdict in favor of the plaintiff in error and the Kansas City Southern Railway Company.

The Circuit Court of Appeals for the Fifth Circuit simply held that the trial court erred in instructing the jury that, as a matter of law, the word "lumber," as used in tariff schedules, did not include railway cross ties, and reversed and remanded the case for another trial. (175 Fed., 33.) That court says that the railways may designate cross ties as a separate commodity, but that the rate for their transportation should not be higher than for the transportation of lumber. The record in this case shows that not only the plaintiff in error, but all the other roads about which there was any testimony at all, long prior to this controversy, designated railroad cross ties as a separate and distinct commodity, and some of the roads had rates on cross ties different from lumber rates.

However, as to whether the same rate should apply on cross ties as on lumber, is peculiarly a question for the Interstate Commerce Commission, and can not, in the first instance, be determined by the courts.

The courts have no power to determine what rates shall apply, or what rates shall be named in tariffs filed with the Interstate Commerce Commission.

The point we make in this case, is that not only the rates, but the classifications of different articles and commodities transported in interstate commerce are primarily for the determination of the Interstate Commerce Commission, and cannot, in the first instance, be determined by the courts. The Interstate Commerce Commission, according to the letter of January 17, 1908, of Commissioner Clark, (Record, p. 110) was disposed to insist on the same rate on cross ties as on lumber of the same kind of woods. In that letter he says, "The idea being to have ties take the same rates as lumber manufactured from the same wood."

It does not follow that because an article is transported at the same rate that it is in the same class. Wheat and corn and barley are often transported at the same rate, but they are not in the same class, and it often occurs that corn is transported at a lower rate than wheat. It all depends upon the rate named in the tariff on file with the Interstate Commerce Commission.

There can be no doubt that the Interstate Commerce Commission would have had authority to have heard and determined all of the matters in dispute in this case, and while it cannot be said positively what conclusion that body would have reached, it is reasonably apparent from the correspondence in the record that the Commission would have held that oak railroad cross ties could not be transported in interstate commerce on a tariff applying only on oak lumber. In other words, the Commission, in all probability would have held that railway cross ties were a distinct and separate commodity from that

of lumber, and could not be transported in interstate commerce on a lumber tariff, unless they were specifically included in the list of articles taking the same rate.

Besides, another jury and another court, under the evidence introduced in this case might so hold. The result being a want of uniformity, as we have tried to demonstrate in our brief.

In conclusion, we desire again to call attention to the fact that the Interstate Commerce Commission, when advised that oak railroad cross ties were then on the line in Louisiana, awaiting shipment to a point in Kansas, and that the plaintiff in error desired to amend its tariff so that said cross ties could be transported at the same rate named in the lumber tariff, required the amendment to be filed, and refused permission to file the same, effective in less than statutory time, or without strictly complying with all of the rules of the Commission for issuing and promulgating tariffs. If the Commission had thought that railroad cross ties could be transported for the rates named in the lumber tariff, it doubtless would have said so, because it was then using its good offices in assisting the defendant in error to have its ties transported at the same rate as then applied on lumber manufactured of the same woods. Under these circumstances, the Commission, if it had thought that said cross ties could have been transported in interstate commerce without being specifically named in a tariff, would, doubtless, have said to the plaintiff in error, "You need not wait to amend your tariff, but you can go ahead and move your cross ties under your lumber tariff." But the Commission did not say so. On the contrary, it required the amendment to be filed.

Counsel for defendant in error, seeing the force of

the objection to the courts determining the issue and awarding the relief prayed for in this case, undertakes to avoid it by arguing that railroad cross ties are, as a matter of law, lumber, and to justify that argument by contending that cross ties are embraced within the generic term lumber, and that therefore, regardless of the requirements of the Interstate Commerce Commission, the trial court should have held as a matter of law, that cross ties are lumber, and rejected all evidence showing or tending to show that, as a matter of fact, they are not lumber. And that is the only theory upon which his case can be legally and successfully sustained; because the evidence in this case would amply and overwhelmingly sustain a finding, that railroad cross ties are a separate and distinct commodity from lumber and are so recognized and treated by people engaged in the lumber and railroad business, and especially in tariffs and schedules of rates on file with the Interstate Commerce Commission, as well as by the Interstate Commerce Commission itself.

That being so, and conceding that the evidence introduced on the trial of this case is sufficient to sustain a contrary finding, the case is one primarily for the determination of the Interstate Commerce Commission, and the courts cannot compatibly, with the Interstate Commerce Act, determine the issues and award the relief prayed for.

Counsel for defendant in error, in answer to the 17th and 18th assignments of error, attacking the verdict of the jury as excessive (Brief, Plaintiff in Error, pp. 123-125), undertakes to sustain the verdict by adding to what could have been recovered under the charge of the court, $3,900 expense for taking

care of the ties, which item, if included, would have increased the amount of the verdict and judgment.

However, the item of $3,900 for taking care of the ties cannot be included, because the jury was not authorized to do so.

The measure of damages, as stated in the charge of the court, is as follows:

"If, on the foregoing issues you find for the plaintiff, then you will proceed to assess the damages suffered by plaintiff. As such damages, the plaintiff would be entitled to recover as actual damages, an amount equal to the difference it would have received for the 44,541 oak cross ties under its contract with the Union Pacific Railway Company and the value of said cross ties at the time the defendant caused plaintiff to breach its contract, and at the places said ties were then located; and also for an amount equal to the difference between the contract price of the remaining 14,429 of said 60,000 cross ties, and the cost which you find from the evidence would necessarily have been incurred by plaintiff in the fulfillment of its contract as to such remaining ties.

"You should also allow interest at the rate of six per cent. per annum on the total amount so found by you, from the first day of January, 1908."

Respectfully submitted,

HIRAM GLASS,
Solicitor for Plaintiff in Error.

Office Supreme Court, U. S.
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JAMES D. MAHER
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No. 180.

Supreme Court of the United States

October Term, 1913.

Texas & Pacific Railway Company,
Plaintiff in Error,
vs.
American Tie & Timber Company, Ltd.,
Defendant in Error.

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR DEFENDANT IN ERROR.

ROLLIN W. RODGERS,
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R. P. DOROUGH,
Of Counsel.

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American Tie & Timber Company, Ltd.,

Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

Statement of the Case.

This suit was filed December 24, 1907, and the first trial in the Court below was had January 21, 1909. The judgment here appealed from was rendered May 12, 1910, transcript of the record filed in the

United States Circuit Court of Appeals for the Fifth Circuit, December 27, 1910, the cause submitted in that Court November 9, 1911, (Rec. P. 238) and opinion rendered December 5, 1911.

The Amended Petition, on which the defendant in error went to trial, is substantially the same as the Original Petition filed herein, except as to the number of ties placed on the right-of-way and amount of depreciation by exposure and weathering of the ties.

Plaintiff alleged that heretofore, to-wit, on the 23rd day of May, 1901, the defendant issued and filed with the Interstate Commerce Commission of the United States its joint through lumber tariff, T. & P. No. 8500-H, applying on lumber, all kinds (except Walnut and Cherry), lath and shingles and articles taking same rates from points on the Texas & Pacific Company to points in Kansas, by and through and under which said lumber tariff the said defendant established, promulgated and put into effect a rate between points on the line of the defendant in the States of Arkansas and Louisiana and the town of Linwood, in the State of Kansas, of 24 cents per one hundred pounds on, amongst other things, oak lumber; that said rate has been continuously, from the date of its promulgation and filing with the United States Interstate Commerce Commission, and is now, in full force and effect, and during the whole of said time has been and is now being used by the defendant, which is a

common carrier, transacting the busines of interstate commerce between all of the points mentioned in said tariff. (Par. II, Rec. pp. 2-3.)

That July 23, 1907, plaintiff made a contract with the Union Pacific Railway Company to deliver to it One Hundred Fifty (150,000) thousand oak cross ties F. O. B. cars at Linwood, Kansas, delivery to commence on or before October 1, 1907, and continue at the rate of fifteen (15,000) thousand ties per month until delivery should be completed, at the price of eighty-six cents (86c) per tie, which said contract by its terms is based on the said freight rate of twenty-four (24c) cents per hundred weight. (Par. III, Rec. p. 3.)

That under said contract between its date and November 30, 1907, plaintiff accumulated and contracted for the delivery at stations along defendant's railroad in Arkansas and Louisiana, for the purpose of shipping over the said railroad under said contract, Forty-four thousand five hundred forty-one (44,541) cross ties made of oak, sawed, riven and hewn in conformity with the said contract, which were distributed at various points named, and on or about October 10, 1907, and on various dates thereafter, requested defendant to furnish cars to be loaded with said crossties and transported to Linwood, Kansas, as it was its duty to do as a common carrier engaged in interstate traffic, and defendant did furnish three cars for such purpose and

transported and delivered said three cars of crossties at said twenty-four cent (24c) rate, under Bills of Lading duly executed; that the crossties so shipped are not included in the aforesaid number of Forty-four thousand five hundred forty-one (44,541) crossties so accumulated, but were in addition thereto, but thereafter defendant continuously refused to receive and transport said ties so offered to it for shipment under its said rate of 24 cents, or any other rate, thereby preventing and wholly disabling plaintiff from delivering said crossties at Linwood, Kansas, under its said contract and receiving pay therefor. (Par. IV. Rec. pp. 3-4-5.)

That by reason of the refusal to furnish cars and to transport said forty-four thousand, five hundred forty-one (44,541) crossties so accumulated along said line of railroad, plaintiff was unable to move said ties or dispose of same until during the summer of 1909, when plaintiff sold said ties for the sum of Ten Thousand Eight Hundred Seven and 01|100 ($10,807.01) Dollars, which was a fair and reasonable price and a reasonable market value of said ties in the condition they were in by reason of being exposed to the weather and elements, as many of them had become utterly worthless and unsalable. That the difference between the price plaintiff would have received for said ties under its said contract, less the cost of delivery at Linwood, Kansas, and their value at the time they were so sold and dis-

posed of was Ten Thousand Five Hundred Seventy-two and 67|100 ($10,572.67) Dollars. (Par. V, Rec. pp. 5-6.)

That but for the unlawful acts of the defendant, plaintiff would have shipped to the said Union Pacific Railway Company in pursuance of its contract, over the line of defendant's railroad fifty-eight thousand nine hundred and seventy (58,970) ties in addition to the three cars transported as aforesaid, on which it would have made a profit of 13.27 cents for No. One (1) and 18.80 cents for No. Two (2) per tie, or the aggregate sum of Seven thousand, nine hundred ninety-one and 22|100 (7,991.22) Dollars. That the defendant by its unlawful acts has prevented the performance of said contract and rendered plaintiff powerless to perform same; and by reason of the inability of plaintiff to deliver said ties at the rate of fifteen thousand (15,000) per month, said Union Pacific Railroad Company canceled the same. (Par. VII, Rec. p. 7.)

That by reason of the premises, plaintiff has been damaged in the sum of Eighteen Thousand Five Hundred Sixty-three and 89|100 ($18,563.89) Dollars, with interest thereon from November 26, 1907. (Par. VIII, Rec. p. 7.)

Plaintiff alleges that under and by virtue of the Interstate Commerce Act of the United States, it is and was the duty of the defendant, which was and is a common carrier within the definition of said law engaged

in interstate traffic, to have provided and furnished upon the reasonable request of plaintiff cars for the loading and carrying of said crossties; and it was also its duty to transport said ties at said published rate of 24 cents as shown by said tariff, which was and is applicable to oak crossties, which are oak lumber. That the defendant by its acts and omissions aforesaid did discriminate unduly, unlawfully and unreasonably against oak ties in the several localities where plaintiff's ties were situated for the purpose of preventing the movement of said ties to points off defendant's line of railway, seeking thereby to compel the plaintiff to sell said ties to the defendant, which is a large purchaser of that commodity, and that the failure of the defendant to move such traffic on its published rate was an unreasonable prejudice and disadvantage to the plaintiff, and to said traffic, inuring directly to the benefit of the defendant as a consumer and purchaser of crossties. (Par. VI, Rec. p. 6.)

Plaintiff avers that the unlawful discrimination of the defendant herein complained of was wilful, wanton and malicious, in that the defendant wilfully refused to accept the shipments tendered to it by the plaintiff, as aforesaid or any other similar shipments, for the sole reason that the defendant wilfully intended that no white oak, post oak or other railroad ties should be by the plaintiff sold to any railroad or railroads whatsoever operating beyond or without the limits of the terri-

tory traversed by the defendant's line of railway. That defendant designedly, knowingly, wilfluly and maliciously refused the aforesaid shipments, or any other shipments of such crossties from the plaintiff, for the unlawful purpose of preventing the plaintiff from selling such crossties to any railiroad or railroads other than the defendant. That such wilful, malicious and vexatious discrimination was wholly unjustifiable and was intended to and did prevent the plaintiff from conducting its legitimate business of dealing in such crossties, and of selling the same in the open market to the various other railways of the United States traversing territory remote from that traversed by defendant's line of railway, and plaintiff therefore avers that the defendant is liable to it in the sum of $25,000.00 as exemplary damages. (Par. XII, Rec. p. 8.)

That plaintiff has been compelled to and has expended the sum of Thirty-nine Hundred ($3900.00) Dollars for services and expenses in looking after and protecting the ties so placed at said stations on defendant's line of railway, which sum is the reasonable value of said services and expenses; and has been further damaged in the sum of Two thousand seventy-four and 89|100 ($2,074.89) Dollars legal interest on the amount of money invested in and the cost of said ties during the time they were so placed ready for shipment and could not be sold or disposed of an account of the re-

fusal of the defendant to transport same. (Par. IX, Rec. p. 7.)

Further that by occasion of the acts and doings of the defendant aforesaid, it has become liable under the provisions of the Interstate Commerce Act to pay to the plaintiff a reasonable Attorney's fee for the institution and prosecution of this suit, which plaintiff alleges to be the sum of Five Thousand ($5,000.00) Dollars. (Par. XIII, Rec. p. 9.)

Attached to this pleading as Exhibit "A" is a copy of the contract between defendant in error and the Union Pacific R. R. Co. (Rec. pp. 9-10.)

We have no objections to the statement of its pleadings by the defendant in error, but we can not agree that the statement of the evidence in its brief is fair and a full statement of all the testimony bearing upon the issues involved; and therefore will make abstract of the evidence which in our opinion is applicable to the issues.

Argument.

The Tie Company brought this suit under Section Eight of the Act to Regulate Commerce, and the amendments thereto which reads as follows:

"That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done, any act, matter or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this Act required to

be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the Court, in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

Other portions of said Act applicable to this case, in our opinion, are the following:

Section 1. "And it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto."

Added to paragraph two, section one, by Act of June 29, 1906.

Section 3. "That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

First paragraph of section three of the original act.

Section 6. "That every public carrier subject to the provisions of this Act shall file with the commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between different points on the route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and

joint rate have been established. * * * * The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force. * * * * Such schedules shall be plainly printed in large type, and **copies for the use of the public** shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation and facilities defined in this Act."

Paragraph one, section six, of the Act as amended June 29, 1906.

Section 6. "The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties."

New paragraph of section six, added by act June 29, 1906.

Section 9. "That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must

in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

The Tie Company's case as made by the pleadings and evidence is that the Railway Company had in a lawful rate duly filed and published under the Act to Regulate Commerce, establishing joint through routes and rates in connection with connecting carriers on lumber all kinds, except certain woods named. That this rate was being used and applied by the Railway Company on all shipments of crossties offered for shipment by others than this plaintiff, without question, and it shipped three cars for plaintiff, but an account of the policy of the Railroad to prevent shipments of ties to other lines from its territory, after discovery of the scale of the operations of plaintiff, the Railway Company refused to accept and transport plaintiff's ties at said lumber rate, or at any rate, thereby preventing plaintiff from fulfilling its contract with the Union Pacific Railway to deliver 15,000 ties per month on said contract, on account of which the contract was cancelled by the Union Pacific. In the attempt to escape the penalties of such unlawful course, the Railway Company contended that ties are not lumber, and could not lawfully be carried on its lumber rate named in its lumber tariff, because not specifically named therein.

I.

The Tie Company contends that "lumber, all kinds," embraces everything coming within the broad meaning of the generic term; and when used in a general commodity tariff, filed and published under requirement of law to enable a carrier to transport the traffic, it must be construed so as to permit the carrier and owner of any form of lumber to transport it as offered. In such a case, the restrictive principle applied to private contracts, to ascertain the intention of the parties, does not apply.

In construing a general commodity tariff on lumber, an article which in fact is lumber cannot be segregated by the carrier and designated by it as a separate or specific comodity to serve its own purposes, based upon an ulterior motive, so as to enable it to refuse to transport such article under such tariff.

The law requires a carrier engaged in interstate traffic to file and publish rates before it can transport such articles of commerce, for the purpose of preventing discrimination, by rebate or other device, in rates for handling such traffic. Such tariffs, when filed, are to be construed, by their plain language, to enable such traffic to be moved, not to restrict its movement.

The Union Pacific Ry. Co. is a party to this Joint Through Tariff 8500-H, (Rec. p. 51,) and construed it

to include crossties, it made the contract for 150,000 crosties, based on the 24c rate named in the tariff. (Contract Rec. p. 11.)

Under that Act as it stood at the times complained of, the Interstate Commerce Commission had no authority to make the classifications of freight, but upon complaint could determine whether or not a published rate was reasonable, or discriminatory.

The first ten Specifications of Error filed by Plaintiff in Error raise the question of the jurisdiction of the Court below to entertain this cause, without previous action by the Commission, because it is claimed that there is a conflict in the evidence as to whether ties are lumber. And in the argument counsel contend that the overwhelming weight of the evidence shows that ties are, in fact, not lumber in the meaning of the term. What meaning? The obvious meaning of the word; the accepted meaning of those engaged in its manufacture; or the **carriers' interpretation dependent upon tradition and the arbitrary practices of a General Freight Office?**

In considering this contention let us first get at the competent evidence in this record.

The testimony relied upon by the Plaintiff in Error to sustain its position consists of:

1. A part of Western Classification No. 43, read-

ing: "Ties, Railroad (Wood), subject to regulations and rates of the individual carriers."

This classification is not referred to in Joint Through Lumber Tariff T. & P. 8500 H (See testimony of Sargent—Rec. pp. 127-128) and can not be used to construe the tariff involved in this cause.

In Newton Gum Company vs. C. B. & Q. Railway Company, (1909) 16 I. C. Rep. 341, the Commission said:

"The law compels Carriers to publish and post their schedules of charges, upon the theory that they will be informative. The shipper who consults them has a right to rely upon the obvious meaning. He can not be charged with knowledge of the intention of the framers, or the Carriers' canons of construction, **or of some other tariff not even referred to in the one carrying the rate.** The public posting of tariffs will be largely useless if the carriers' interpretation is to be dependent upon tradition and the arbitrary practices of a General Freight Office.

Commodity rates of Transcontinental Freight Bureau Tariffs are not to be construed as governed by Western Classification in absence of tariff provisions to that effect. On complaint alleging improper assessment of charges on shipments of show cases from Quincy, Ill., to San Francisco, Cal.; **Held,** That show cases are entitled to the commodity rate on furniture under transcontinenetal tariff in effect at the time of shipment. Reparation awarded."

In Pitts & Son, vs. St. L. & S. F. Ry. Co., 10 I. C. C. Rep. 684, the Commission said: "The purpose of requiring rates to be published and posted is to inform the public of the rates of transportation at which shipments can be made. **A notation in the tariff of one carrier making reference to the tariff of some competing carrier, a tariff which may not be accessible to the**

prospective shipper, cannot meet the requirements of the law that the rate charged shall be published and posted."

2. The testimony of rate experts and traffic employees of Railroads, who state their construction of the tariff in effect. All of this testimony was incompetent, and it will be noted in the record that the same was duly objected to, on the trial, by the defendant in error.

In Hurlburt vs. L. S. & M. S. Railway Company, 2 I. C. C. Repts 122; 2 I. C. Rep. 81, it is said:

"The Commission has long since repudiated the suggestion that Railroad Officials may be looked to as authority for the construction of their tariffs. In this decision Judge Cooley stated that: "A classification sheet is put before the public for its information. It is supposed to be expressed in plain terms, so that the ordinary business man can understand it, and, in connection with the rate sheets, can determine for himself what he can be lawfully charged for transportation. The committee who prepared this classification have no more authority in construction than anybody else, and they must leave the document, after they have given it to the public, to speak for itself."

"Terms of art, or terms peculiar to a particular occupation or business used in classification, may sometimes require the evidence of experts for their full understanding, **and testimony of persons connected with transportation, as to the understanding of such terms in transportation circles,** is not competent for the plain reason that it is not the meaning as understood in transportation circles that is in question, but the meaning accepted and acted upon in the business in which the articles are dealt in and made use of. The classification is supposed to inform the persons engaged in that business in what classes the articles they handle

are placed for transportation purposes, and it would fail to do this if, instead of employing terms of designation in the sense familiar to themselves, it made use of them in a sense fixed upon by persons engaged in an occupation altogether different, and which might, to an expert in their own business, be strange and misleading."

In C. B. & Q. Railway vs. Feintuch, 191 Fed. 488, the Court say:

"Schedules are published for the information of the public in general, who are not supposed to be cognizant of technical usage in rate problems, and it would be a snare to the unwary and uninformed, to construe and interpret tariff schedules by any such technical standard."

II.

The defendant in error respectfully insists that, under the competent evidence in this record, it was the duty of the Trial Court to instruct the Jury, that the ties offered for transportation by defendant in error are lumber, and it was the duty of the plaintiff in error to transport them under its Joint Through Lumber Tariff No. 8500 H, which is admitted to have been duly filed with the Commission and in effect at the time, covering "LUMBER, ALL KINDS," between the points of origin and destination of the shipments offered.

The specifications in the contract describe the dimensions, length, etc., of the ties to be furnished, and this description alone makes the articles called for lumber.

"Said Crossties must be manufactured from straight, sound live timber, free from cracks, shakes, rot and rotten knots; they must be not less than eight feet (8) nor more than eight feet (8) and one inch (1), in length, with ends sawed or cut square; all bark taken off. Hewn or sawed on two parallel sides to straight, smooth surface on sides. They must be not less than six inches (6) thick between parallel faces and each face must not be less than eight (8) inches wide at every point. The following varieties of timber will be accepted: White Oak, Burr Oak and Post Oak." (Rec. page 9.)

Under the contract with the Union Pacific Railway, the Tie Company could have furnished sawed ties, and if it had put in mills to cut the ties, or purchased them from mills on its line of railway, according to the testimony of Mr. Sargent, the General Freight Agent, those ties would have been accepted and transported under this Joint Tariff, without question. (Rec. p. 122-3.)

There is no conflict in the competent evidence in this case to justify any Jury, in any Court, under proper instructions, in finding the ties to be furnished under the specifications in the contract involved here are not lumber, and are not included in a tariff covering "lumber, all kinds," unless of the woods excepted, when tendered for shipment.

In American Tie & Timber Company vs. K. C. S. Ry. Co., et al., 175 Fed. 28, the Court held:

"Lumber is a generic word of indefinite meaning. In one contract or written paper, in the light of the context, it might be more comprehensive than in anoth-

er contract or writing where the context might tend to limit its meaning. When unlimited by surrounding circumstances or by the context, the word includes many specific things. Cole, C. J., said in Williams v. The Stevens Point Lumber Company, 72 Wis. 487,489, the word "lumber" includes "any timber sawed or split for use." The Century Dictionary gives the same definition: "Timber, sawed or split for use, as beams, joints, planks, staves, hoops and the like." The definitions found in other dictionaries do not vary greatly from this. Laths are said to be lumber, in Babka v. Eldred, 47 Wis. 189, 191; and singles are said to be included in the word, as used in statute; Gross v. Eiden, 53 Wis. 543,547. And lumber is said to include fence posts, in Ryan v. Guilfoil, 13 Wash. 373, and the Court observed: "It matters not whether they are split through the medium of a maul and wedge or through the medium of machinery in a mill; they are in either case manufactured from timber*******" There are other cases indicating the generic character of the word. Sands v. Sands, 74 Me. 239; Bendur v. LeBourne, 79 Me. 21. The cases that deal with the meaning of the word "lumber" indicate that it may mean anything manufactured out of the log with saw, ax, maul and wedge, or machine, for building houses, bridges, fences or railroads. After the product leaves the log for commercial use, if it is suitable to use for any of these purposes, it may be denominated lumber, as the word is used in this country."

STATEMENT OF EVIDENCE.

The Tie Company introduced in evidence joint through lumber tariff, T. & P. No. 8500-H, and particularly the following portions thereof:

On pages 4 (numeral lettering) to page 40, inclusive, constituting index to stations, is found Linwood, Kansas, and refers to Index No. 4417; Index No. 4417

is found on page 57, which reads as follows: "57 Union Pacific Railroad."

Under the head of "Stations to" is found Linwood, Kansas. Under the head of "Note" (capital letters) "E. G. H." Under the head of "Route" is 11, 24, 54; under the head of "Rate" is 24, the page being headed "Rates in cents per one hundred pounds." Under the head of "Note," "E. G. H." refers to different routings, as shown on page 78. On page 78 under the head of "Routing Instructions" we find "Route 11," reads, "via Route 10 and Kansas City, Missouri." Route 10 on same page reads: "Via St. Louis, Iron Mountain & Southern, and Missouri Pacific Railway." Route 24, on page 78, reads "Via Route 23 and Kansas City, Missouri." Route 23 reads, "Via M. K. & T. Ry." Route 54 on page 79 reads, "Via Route 52 and Kansas City, Missouri." Route 52, on page 79, reads, "Via Shreveport or Texarkana, and Kansas City Southern Ry."

These letters "E. H. G." refer to notes so numbered to be found on page 66. I will read Note "E:" "Note E. Rates apply via St. Louis Iron Mountain & Southern Railway from Texas and Pacific Railway in Texas, Louisiana and Arkansas," also other lines not necessary to mention.

"Note G. (Found on page 67.) "Rates apply via M. K. & T. Railway from Texas and Pacific Railway in

Texas, Louisiana and Arkansas," also other lines not necessary to mention.

"Note H" (pege 67.) "Rates apply via Kansas City Southern from Texas and Pacific Railway in Texas, Louisiana and Arkansas," also other railroads named, not material. (Rec. pp. 39-40.)

Plaintiff introduced that part of the whole front page showing that this is a Joint Through Lumber Tariff and in connection with the roads named therein, and especially as to the Union Pacfic Railroad Company, that it was a party to this tariff and that the companies named in Notes E. G. H., Kansas City Southern, M. K. & T., St. L. I. M. & S. Ry., and applies from all their points to any point reached by any of the carriers named. (Rec. pp. 40-41.)

Front page Joint Through Lumber Tariff T. & P. N. 8500-H.

I. C. C. No. 792, File for Public Inspection.

"El Paso Route."

The Texas & Pacific Railway Co.

Traffic Department.

In Connection with:

Here follows list of names of different railroads, among them Kansas City Southern Ry. Co., Missouri, Kansas & Texas Ry. Co., St. Louis Iron Mountain and Southern Ry. Co., and Union Pacific R. R.

Joint Through Lumber Tariff T. & P. No. 8500-H.

applying on

Lumber, all Kinds (except Walnut and Cherry) Lath, and Shingles, and

Articles Taking Same Rates. (See pages 76 and 77.)

Carloads, Minimum Weight, 30,000 lbs. (Except where otherwise noted.)

from

Points on the Texas & Pacific Railway, also Connecting Lines in Texas, Louisiana and Arkansas.

to

Points in Arkansas, Arizona, Colorado, Idaho, Illinois, Indian Territory, Kansas, Minnesota, Missouri, Montana, Nebraska, New Mexico, Oklahoma Territory, Tennessee, Utah, Wisconsin and Wyoming.

Effective June 1, 191. (Except Advances June 8, 1901)

Issued May 23, 1901, by

W. F. Braggins, D. F. A., T. & P. Ry. Co., New Orleans, La.

H. L. Redfield, A. G. F. A., T. & P. Ry. Co., Dallas, Tex.

E. L. Sargent, G. F. A., T. & P. Ry. Co., Dallas, Texas.

The proper officers of the above named lines will certify to the Interstate Commerce Commission their concurrence in this issue.

To I. S. C. C. May 23, 1901. Authority No. 65310, Receipt No. 17860.

On page 2 of the tariff there is a list showing the names and addresses of the ofifcers acting for the various railroads named as concurring in this tariff, and there is found:

E. E. Smythe, G. F. A., K. C. S. Ry., Kansas City, Mo.

W. B. Groseclose, G. F. A., M. K. & T. Ry., St. Louis, Mo.

J. C. Lincoln, G. F. A., St. L. I. M. & S. Ry.

J. A. Monroe, T. M., Union Pacific R. R., Omaha, Neb.

(Rec. pp. 40-41.)

Page 76 of said tariff 8500-H. is the only one showing application of the rates and is as follows:

"Application of rates. List of articles taking lumber rates and higher.

"Rates named herein will apply on lumber (excepting butternut, cherry, walnut and foreign woods of value); also the following articles when manufactured of woods other than butternut, cherry, walnut or foreign woods of value, in straight or mixed carloads." (Rec. pp. 127-128.)

Plaintiff introduced in evidence a portion of section 12 of Tariff Circular 14-A promulgated by order of the Interstate Commerce Commission, June 3, 1907, commencing on page 12, which reads as follows:

"The law affirmatively imposes upon each carrier the duty of filing with the commission all of its tariffs and amendments thereto, as prescribed in the law or in any rule relative thereto which may be announced by the Commission, under penalty of failure to do so, or for using any rate which is not contained in its lawfully published and filed tariffs. The Commission will give such consistent assistance as it can in this respect, but the fact that receipt of a tariff or supplement to a tariff, is acknowledged by the Commission, or that a tariff or a supplement to a tariff, is in the files of the Commission will not serve or operate to excuse the carrier from responsibility or liability for any violation of the law, or of any ruling lawfully made thereunder, which may have occurred in connection

with the construction or filing of such tariff or supplement." (Rec. pp. 215-216.)

(Plaintiff read extracts from Circular 15-A, promulgated by the Interstate Commerce Commission, February 3, 1908.)

Freight Tariffs and Classification.

"Tariffs that were lawfully on file with the Commission on May 1, 1907, and that have not since that time been superceded or cancelled, will be considered as continued in force, and until they can be properly reissued may be amended without complying with the requirements of these rules as to the number and volume of supplements, and as to showing the concurrence forms and numbers. All tariffs issued or re-issued later than May 1, 1907, must conform to all of these rules. The Commission may direct the re-issue of any tariff at any time. A tariff publication as to which these regulations have not been conformed to is subject to rejection by the Commission when tendered for filing.

"The term 'joint rate,' as used herein, is construed to mean a rate that extends over the lines of two or more carriers and that is made by agreement between such carriers.

" 'Joint tariffs' are those which contain or are made up from such 'joint rates.' " (Rec. p. 216.)

W. F. STERLEY, testified that he is General Freight Agent of the Ft. Worth & Denver Railroad, and had occupied that position about eight years. That in construing a tariff, the railroads would handle any kind of building material under the head of lumber as defined in the tariffs, and whatever that definition may be, would be considered as lumber, and that a tariff covering "lumber, all kinds" means all kinds of lumber.

(Rec. pp. 79, 80, 81.) We apply the oak lumber rates on any kind of oak lumber, a commodity regarded by the trade as lumber is lumber. (Rec. p. 83.)

H. S. HINTON, witness for the defendant, testified that he is the Commercial Agent at Shreveport for the T. & P. Railway Company; that sometime in the fall of 1908 he received a letter from Mr. Sargent, General Freight Agent, requesting him to call on the American Tie & Timber Company about the rates applicable on ties, and I called on Mr. Marshall, I think on Sept. 28th, and told him I was requested to call on him by Mr. Sargent and to say to him that we had no published commodity rate on oak ties from Sodus, Marthaville, etc., to Linwood, and Junction, Kansas, and other points inquired about in his letter. I told him we had no published commodity rate on oak crossties between the points inquired about, but informed him that Mr. Sargent would put in a rate of fifty cents (50c) per hundred pounds into Linwood and Grand Junction, provided it was acceptable and he would use that rate. Mr. Marshall asked me to give him a written statement of these quotations I had named of fifty cents and seventy-five, and I told him I didn't care to without first taking it up with Mr. Sargent. (Rec. pp. 93-94.) I offered to put in a rate of fifty cents per hundred weight to Linwood, Kansas, and Seventy-five cents to Marshalltown, Iowa; Minneapolis, Minn., and Chicago. (Rec. p. 94.)

E. L. SARGENT, witness for defendant, testified that he is General Freight Agent of the Texas & Pacific Railway Company, and has been since September, 1892. That the first thing he had to do with the offer of the American Tie & Timber Company to ship ties from Louisiana to Linwood, Kansas, was a letter from the Commercial Agent asking for a tariff which was furnished, and the first communication was a letter dated Sept. 24th, asking for rate on oak railway crossties from various points in Louisiana to Linwood, Kansas, and other points, to which on Sept. 25th we replied through Mr. Hinton that there were no rates of freight, but offered to put in a fifty cent rate if we were assured that it would be used. (Rec. pp. 96-97.) That the first information he had that there had been some ties shipped out under this tariff, was that some cars had been shipped from Cypress and Chopin, Louisiana, and Fouke, Arkansas, and I wired the Superintendent at Texarkana in regard to shipments from Fouke and wrote the other gentlemen direct calling their attention to the fact that we had no rate. (Rec. p. 113.) With reference to the Agent at Fouke, we notified him that he must not accept any more oak crossties for Interstate destinations for the reason that no legal published tariff to cover the movement of them and to cease making shipments without tariffs to cover. As to the Agents at other points, I don't recollect the exact reasons they gave, **but they stated they were applying**

certain tariffs in which oak crossties were not enumerated, and I instructed them that they must not accept or forward any further shipments of crossties without having a specific tariff to cover it. (Rec. pp. 113-114-115.) That the question as to whether or not crossties are included in lumber in T. & P. Tariffs has come up for determination in his Department, and in this particular instance he passed upon the question for the T. & P. Railway Company. (Rec. pp. 115-116.)

In my opinion a tariff which applies on lumber, mentioning specific articles that take the lumber rates, would not apply on railroad crossties unless they were specifically mentioned in the tariff. (Rec. p.p 116-117.) This testimony was duly objected to by plaintiff.

On cross examination, witness testified that he instructed Mr. Hinton to call on the American Tie & Timber Company and offer them a rate of fifty cents per hundred pounds on oak crossties, car loads, to Linwood, Kansas, or Kansas City, if they would use the rate. At that time our oak lumber rate to Linwood, Kansas, was twenty-four cents, and we offered to put in a rate of fifty cents on ties. I have been General Freight Agent for the T. & P. Railway Company since 1892, and have supervision of tariffs that are required by law to be filed with the Interstate Commerce Commission, and have general knowledge of their requirements. Their general form is prescribed by law; all you have to do to file Amendment is to name the num-

ber of tariff you want to cover. Texas & Pacific Joint Tariff 8500-H was in force at the time the American Tie and Timber Company offered to ship their ties. We had Joint Through Interstate Rates covering lumber to Linwood, Kansas. When we put in application to the Commission to amend the rate on less than statutory notice, we did not designate 8500-H, but requested to have it cover all tariffs, which would include this tariff, and it was on this account that the Commission did not let us file the amendment. The Executive Department usually directs the entire policy of the road, and incidentally the traffic policy, if **considered advisable.** The rates with reference to a certain commodity would be suggested by the Executive Department, and I, as head of the freight department, would make the rates in accordance with that policy. (Rec. pp. 120-121.) When I found the American Tie & Timber Company were putting ties along the line of the road, I did not take up with the Executive Department as to what the policy of the road would be towards these people. Witness here shown memorandum of letter heretofore introduced as Exhibit No. 43, as follows:

"Mr. H. L. R. This letter was written after conference with Vice-President Thorne and Assistant, Mr. Everman, who after reading extracts from Com. Cockrell's letter decided that this would be the proper thing to do. Kindly put into effect the views expressed to Com. in my letter. E. L. S." Mr. H. L. R. is Mr. Redfield, Assistant General Freight Agent. Page 76 of tariff 8500-H states a list of articles taking lumber rates and higher. The Texas & Pacific Railway Com-

pany **transported yellow pine and sawed ties from mills at lumber rates during all this time, and do yet.** We have been using that tariff ever since it has been filed and shipping ties, the products of saw mills, under it. In arriving at my opinion with reference to ties and lumber, I make a distinction as to whether the ties are sawed at a saw mill or hewn or made by hand. Unless it was made by a saw mill even though the same stock and of the same size, they would not be classified as lumber. I think that is the reason that oak railway crossties made by hand are not included in the term lumber. (Rec. pp. 121-122-123.) Lumber enters very largely into the construction of railways. We have not now a tariff on railway construction material as such. In years gone by there was a great many tariffs made for railway construction material and building of new roads. In fact, before the Interstate Commerce Commission when a new road was to be built, as a rule the Contractor went to the railroads and asked for rates on construction material for the construction of a particular road. We have had no such tariffs since we had to file them with the Interstate Commerce Commission. Questioned by the Court, witness testified: As to why we do not have a tariff now on oak ties, I don't consider it necessary. I don't think of any other answer. I don't think it was the policy of the Executive Head of the road to encourage the moving of oak ties off the line of our road at low rates. Our offer to

put in a rate of fifty cents per hundred pounds, I do not believe could be called an encouragement of the shipment of oak crossties. I do not think I can say that it was to encourage it. It would be a reduction from a combination of local rates. Considering the value of each commodity, I say that conceding that oak ties are not to be considered as lumber, but taking into consideration the character of the commodity, oak crossties, I would say that fifty cents per hundred pounds would not be well proportioned as a fair through rate when the rate on lumber was 24 cents per hundred pounds. I would not concede they were to be classsd as lumber; if we admit them to be classed as lumber, we would put in the same rate. (Rec. pp. 123-124-125.)

By instructions of the Interstate Commerce Commission when we did file what we call an Amendment to this tariff, we put in the same rate on ties that we had on lumber. The other companies named in this tariff listed on the first page joined in making that Amendment to tariff 8500-H, which was filed by the Texas & Pacific Railway Company with the concurrence of the various lines named therein. After the Interstate Commerce Commission signified its desire for us to make the same rates on oak ties as we had on lumber, we got the concurrence of the other roads. I don't think any of them demurred. I am reasonably familiar with the rules and decisions of the Interstate Commerce Commission and try to keep up with them. It

is practically imperative in my office that I should have a general knowledge of them. (Rec. pp. 125-126.) This lumber tariff 8500-H is a commodity tariff as distinguished from class tariffs. My idea of the definition of lumber would be a manufactured article of various products manufactured by a saw mill; timber sawed into merchantable shape. (Rec. p. 127.) This tariff 8500-H is a commodity tariff on the commodity of lumber, and articles specified in it taking lumber rates and higher than lumber rates. (Rec. p. 131.)

Western Classification No. 43 effective October 1, 1907, provided as folows: "Ties railroad (Wood) subject to regulation and "rates in tariffs of the individual carriers." (Rec. pp. 131-132.)

E. E. SMYTHE, General Freight Agent for the Kansas City Southern Railway Company, testified that basing his opinion on the experience he had in the construction, formation and interpretation of railroad tariffs and schedules, railroad cross ties do not come under the designation of lumber. (Rec. pp. 132-133.) That his road put in rates over their own rails from all stations in Louisiana and Arkansas to Kansas City, of twenty-three (23c) cents per hundred pounds, effective December 5th, 1907. Prior to putting in this rate they handled oak lumber under Joint Through Tariff 216-D, to Linwood, Kansas, on the 24 cent rate. (Rec. pp. 135-136.) The Kansas City Southern Railway Com-

pany is a party to the Texas & Pacific Joint Tariff, 8500-H, and concurred therein. (Rec. p. 136.)

S. G. REED, Assistant General Freight Agent of the Houston & Texas Central Railroad Company, testified that in his opinion based upon his service and experience in the construction of railroad freight tariffs, that he did not consider and had never considered in interpreting tariffs that lumber included ties, unless they were specifically mentioned. (Rec. p. 137-138.) That he knew nothing about how the Texas & Pacific construe their tariffs. (Rec. p. 139.)

GEORGE T. ATKINS, Chief Clerk to the General Freight Agent of the M. K. & T. Railway Company, testified that in his opinion based upon his experience in the formation and promulgation of railroad tariffs, ties do not come within the meaning of lumber. That he speaks from a standpoint of the railroads. (Rec. p. 140-141.) That the M. K. & T. Railway Company is a party to Texas & Pacific Joint Through Tariff No. 8500-H. That his road would accept the classification of the initial carriers, if the rate that they bill it under is correct. This Joint Through Lumber Tariff is a commodity tariff. This is ascertained by reference to page 76, which shows that it applies on lumber except Butternut, Cherry, Walnut and Foreign Woods of value; also on certain articles named when manufactured of wood other than those mentioned, and then follows a list of articles taking lumber rates and higher. This charac-

ter of tariff would not have any effect on articles not named. It would simply have the effect of making the rates named therein applicable to lumber and articles taking lumber rates. As I understand it as to whether a given article made of wood is lumber and falls under the general designation of lumber is covered by the trade; articles that are spoken of, sold and handled as lumber. I say under no circumstances would oak ties be considered lumber, unless they were so specified, because I don't believe they are lumber. I don't know that there is any technical difference between a 6x8x8 which would be used for ties and a 6x8x8 to be used in the construction of a building. A man ordering lumber could specify his dimensions. If he had use for 6x8x8 made of lumber, I should say it would be lumber. As to whether it was sawed at the mill or hewn in the woods, I should say it would depend altogether to whom consigned and for what purpose; usually if consigned to a railroad or a railroad company, I would not consider it lumber. I cannot say that it is true of all carriers that the only reason railroad companies can have for making a different rate on cross ties, and similar pieces of lumber sawed at a saw mill for another purpose, is that they want to regulate the movement of cross ties from their rails by a difference in the rate. I can't say it is true this is the only valid reason they can have for it. (Rec. pp. 142-143-144.) I understand that the tariff reading (rates named herein will apply on lumber, ex-

cept certain woods of value), I would consider it to be applicable to shipments of lumber about which there was no dispute—anything that is actually lumber and not of the woods that are excepted. This tariff also reads "also on the following articles when manufactured of woods other than" those excepted, and names such articles that may not be lumber at all, but take the lumber rate. When I state the articles must be specified in the tariff, I mean articles that take the lumber rate or higher. (Rec. pp. 145-146.)

We note a clerical error in the answer of this witness as to Western Classification No. 43, (which is copied verbatim at Page 132 of the Record.) I did not mean to say that this tariff specifying "on lumber of all kinds," except certain hardwood "and also the following articles," elminates from that tariff "lumber all kinds," except hardwood; it would apply on lumber and articles enumerated. (Rec. p. 146.)

T. M. LUCAS, testified that he is engaged in the retail lumber business in charge of the local office at Dallas of the Mayfield Lumber Company; that he had been in the lumber business since 1900, and had experience in handling and shipping lumber of the different kinds generally used in that section. That they do not handle railroad cross ties in stock, and don't retail them. (Rec. pp. 146-147.) That in his experience in handling lumber and ties, railroad ties are not lumber —that they do not carry them. (Rec. p. 148.) That in

his opinion there is a distinction about a product being lumber as to whether it is made at a saw mill or made in the woods by hand. That he does not designate anything made by hand as lumber at all. (Rec. p. 149.)

GEORGE W. SIGNOR, testified that he had never seen ties regarded as lumber. That the distinguishing characteristic is, that ties are made by the piece. That lumber is always sold by the thousand feet, and ties are sold by the stick. (Rec. p. 150.) That he has now a contract with the Texas & Pacific Railway Company to furnish it cross ties, and has had a tie contract for eighteen years. That it is an exclusive contract over most of the road; that there is another contract at the lower end of the road down in Louisiana where they use a nine-foot cypress tie. That he furnishes said road all they need for their requirements, averaging about Eight Hundred Thousand (800,000) per year. That the defendant doesn't buy ties from anyone else without his consent unless he should fail to furnish them, when they have a right to purchase elsewhere after giving thirty days' notice. It used to be in my contract that I could take orders for ties or sell them to others without the approval of the Texas & Pacific Railway Company (Rec. pp. 152-153.)

F. H. SHOUP, testified that he lived at Omaha, Nebraska, and was in the purchasing department of a railroad; that he had never been in the lumber business. That he had inspected lumber supplies for different

railroads, but that he had never been a shipper of ties and had been a buyer of ties only this way, that the company would give him a price to pay for them, and he would place the orders accordingly. That he had never been a buyer or seller of lumber. That from his experience in handling and dealing he does not consider ties as lumber; that some ties are bought by the thousand feet and some are bought by the stick. (Rec. pp. 159-160.) That there are thirty-two feet (32) feet of lumber in a tie 6x8x8, and the price of ties is regulated according to the price of lumber. In other words, the cubic feet are taken into consideration in fixing the price. (Rec. p. 164.)

WILLIAM LINGO, testified that he is Vice-President and General Manager of the Lingo Lumber Company, engaged in the retail lumber business at Dallas; that he had never handled oak railway cross ties in his business. From my lumber experience, I do not know whether ties are a part of the lumber business or not. It is not a part of my business. In my opinion, I would not consider that oak railroad cross ties come under the designation of lumber. I don't know anything about what the specifications of a standard tie are. I handle fence posts, but do not consider them lumber—handle all sizes pine dimension stuff; don't handle oak at all. We could sell oak if we had it here in stock, but it takes quite an outlay of money to carry it and the business is confined here to two or three yards practically,

and when we have to have any, we go to these yards and buy it. (Rec. pp. 184-186.)

J. L. LOGAN, testified that he is in the wholesale lumber business as a manufacturer and had been so engaged about eight years. That about 75 per cent of his business goes from Texas & Pacific territory into the West, from points in East Texas and Louisiana. That he handles largely railroad material, his business being largely confined to railroad and mining timbers. That he bought during the years 1906 and 1907 some ties from D. G. Petty Lumber Company, of Boline, Louisiana, owners of a mill. I bought some oak ties from him, and he was shipping a great deal of pine for our company right along. I should say that we bought an average of three cars of oak ties a month from him during 1906 and up till May, 1907. They were shipped through the El Paso Gateway from Boline, Louisiana, on the Texas & Pacific. I can't say on what rate they were shipped, but it was the rates in existence at that time. I also bought a great deal of pine ties and lumber from Mr. Petty and these ties were shipped on the same rate as pine lumber; handled from twenty-five to thirty carloads per month from this mill during that period. These ties went to El Paso on the same rate lumber was shipped out on. (Rec. pp. 187-188.) In my opinion, railroad crossties are lumber. I buy them that way and ship them that way; buy them sometimes by the piece and sometimes by

the thousand feet, very often buy them by the thousand feet, the same as I would 2x4. To give you an illustration of fence posts, for instance, I buy them by board measurement. We ship right along; order sixty thousand (60,000) fence posts, 4x6, and ship lumber out to be used as fence posts. In the lumber manufacturing business I have never heard that there is any difference why a stick is called lumber by reason of its being a particular length, and I say there is no such difference. (Rec. p. 189.) The ties which I have testified about went through to El Paso or west of El Paso, sometimes to the El Paso Southwestern, sometimes Douglas, Arizona. I know positively that some of them went beyond El Paso, but to what extent in amount, I could not say. I know some of them were billed through beyond El Paso. The cars were always loaded, exclusively ties or exclusively lumber. I have seen the bills of lading at different times along. They were designated sometimes as a car of ties, sometimes as a car of lumber. In a general way, buying and selling lumber is by the foot. Switch ties and railroad crossties from the saw mill are nearly always by the thousand—nearly all other lumber is bought by the thousand. (Rec. pp. 190-191.) If I were going to buy oak ties, I would buy them whatever way the fellow who had them to sell wanted to figure them, either by the piece or by the thousand. I am selling a great many cull ties, what we call No. Two (2) to be used

for fence posts. A number two tie is generally defective in size, rather than in quality of material, and we are selling a great many to the miners in Arizona who use them in place of square timbers. (Rec. p. 192.)

The shipments of oak ties I have mentioned was a small part of the total shipments from that mill. The Texas & Pacific Railway Company had no pine tie rate from stations in Louisiana to El Paso. The tariff does not name any pine tie rate to El Paso, Texas. I was not shipping under Schedule No. 8500-H. These mine props that I ship out from Louisiana points were shipped on the same rate as lumber. We call them stulls, but the tariff didn't call for stulls, nor did it call for mining props. A stull is all the way from six feet to ten feet in length and from six inches and up in diameter. Different companies use different size; it is all old field pine and usually the skin is peeled off. They are not put through a saw mill at all. They take the same rate as lumber to El Paso; these are through rates and uniform especially from Louisiana to El Paso. (Rec. pp. 194-195.)

H. L. REDFIELD, testified that he was Assistant General Freight Agent of the Texas & Pacific Railway Company; that from his experience in the Texas & Pacific office in the promulgation and construction of tariffs, particularly lumber tariffs, he don't understand that railroad ties are considered as

lumber in any of their tariffs. I don't understand they are considered lumber at all; they sometimes are put in the tariffs by special application, but unless they are, they are not considered in the tariff. (Rec. pp. 195-196.)

Plaintiff duly objected to all this testimony.

The place Douglas referred to by Mr. Logan is in Arizona. Tariff 8500-H covers stations in Arizona. I could ship anything covered by this tariff as long as it was in effect, and if it names a specific rate to Douglas, that would be the only issue to be used. (Rec. p. 199.)

D. G. PETTY, President of the American Tie and Timber Company, testified that he had been engaged for the past twenty-seven years in the saw mill business on the line of the Texas & Pacific Railway in Louisiana. That the capacity of his plant of all kinds of lumber and ties was from eighty to one hundred cars per month; that he sold this plant in May, 1907. I was engaged in manufacturing everything made of logs; all kinds of lumber. Among the men who manufacture lumber there is no difference or distinction between railroad crossties and other forms of lumber. It is all counted lumber. I made thousands of ties, both pine ties and oak ties during the time I was operating the saw mill. The ties are 6x8 and from six to ten feet in length; they are cut in different lengths. I sold ties generally by the thousand feet; very few I

ever sold by the piece, and when sold by the piece, the price is fixed by the contents of lumber in the stick. During the year 1906, I shipped a good lot of railroad crossties, I supose over one hundred thousand. I was in business at that point from 1903 to 1907, and shipped crossties all the time I was there and from every mill I have had on the Texas & Pacific in Louisiana. We shipped both pine and oak ties on the lumber rate; they were billed to Interstate points. That is, some of them were billed to El Paso and some billed beyond. As a matter of fact it makes no difference at all as to the length of a stick of timber as to whether it is lumber or not. I have shipped lumber from four feet up to forty feet in length. There is no difference among manufacturers of lumber as to whether there is a particular name on the piece; that does not segregate it; it is all lumber. Flooring and stringers are lumber, or anything made from a log. Railroad plates, stulls, caps,—which are put on top of piling for the stringers to lay on in a railroad track—is all lumber, of course. Ties are of different lengths from six to ten feet. Telegraph poles and piling are always billed as lumber. (Rec. pp. 203-205.) During the years from 1901 to 1907 our plants sold railroad ties to other people than Mr. Logan and when they were shipped out, they were shipped out under lumber rates like we ship everything else. A guard rail is a piece of timber generally 6x8 placed on the end of the ties so

they won't spread, and for that purpose used exclusively by the railroads. They are lumber, as also are crossing planks used by the railroads which are generally 3x12x18. The ties I shipped were sawed, but hewn railroad crossties are also lumber; anything that is put in shape I would call it lumber. (Rec. pp. 206-207.) These shipments were billed out as lumber, sometimes as ties or stringers, and sometimes different names. The bills were made out as ties instead of as lumber, more from habit than anything else. (Rec. p. 208.)

A. L. BURKE, testified that he is in the timber business handling ties and lumber and had been so engaged at one time and another for twenty years or more. That he had been employed by railroads in transportation, construction, maintenance of way department, and pretty near all departments. I am familiar with the term lumber and what it means, both among railroad men and among producers of lumber. I think ties are included in the word lumber; that has always been my supposition. (Rec. p. 209.) I have both bought and sold lumber, and in shipping them out have invoiced lumber as ties and ties as lumber. I am at present invoicing ties to the National Lumber and Creosoting Company at so much per thousand (feet) which the contract calls for. In the invoice to describe the ties, we simply give the size, 6x8x9, or whatever the figures are, so many feet. It is not a fact that on

every invoice I wrote "crossties." I am shipping stuff now to the Rock Island, and they specify that the ties are to be paid for per thousand feet board measurement, and that is the way I invoice them. These are switch ties; some of them are longer, and some are not than an ordinary tie. An ordinary tie is eight feet long and a switch tie is eight feet and up to seventeen feet, and I have seen some of them nineteen and one-half feet long. Oak ties are creosoted, hewn oak ties, and I am shipping them now to be creosoted and simply describe them as lumber. (Rec. pp. 212-213.) While I was Commercial Agent for a railroad, I didn't feel that I needed any assistance or help in construing tariffs. The office boy should be able to construe it after it was written out; there is no trouble in construing rates. (Rec. p. 215.)

It will be noted in the record that all the testimony introduced by the railroad company as to the opinion and construction by the railroad men of the tariff in controversy and railroad tariffs generally, was duly objected to by the plaintiff.

J. J. MARSHALL, testified that he became Manager of the American Tie and Timber Company August 1, 1907. (Rec. p. 21.) That said company had a contract dated July 23, 1907, with the Union Pacific Railroad Company for the sale of One Hundred and Fifty Thousand white oak crossties, hewn or sawed per specifications named in said contract of which five per

cent of said ties might be second class, and would be accepted at a price not exceeding two-thirds of the price of first-class ties after deduction of freight charges, delivery of said ties to be commenced on or before October 1, 1907, and continued at the rate of fifteen thousand ties per month until deliveries are completed, said ties to be delivered to Union Pacific Railroad free on board cars at Linwood, Kansas, for the price of eighty-six cents each, based on the present freight rate of twenty-four cents per Cwt., said contract further providing that should there be an increase in the freight rate above named of twenty-four cents per Cwt., during the life of this contract, the railroad company is to assume such additional cost of freight, or may, at its option cancel contract for any undelivered portion of same, should it not be willing to pay such additional freight charges. Should there be a decrease in the freight rate during the life of this contract, the railroad company shall receive a corresponding reduction in the price of all ties delivered after said reduced rates take effect. (See Contract Rec. pp. 9-10.)

After the Tie Company made this contract with the Union Pacific, I immediately set to work along the line of the Texas & Pacific Railway Company in Louisiana and Arkansas, and the Kansas City Southern in Louisiana and Arkansas, to get the ties to fill the contract with, and did accumulate a good number

of them. Between the 25th of September and the 1st day of October, we were ready to commence the first delivery of the ties, and did deliver a few carloads, I believe nine, from the Kansas City Southern; three from the Texas & Pacific. On the latter road, two cars were shipped from Cypress, and one from Chopin, Louisiana. They were billed to the Union Pacific Railroad Company at Linwood, Kansas, at twenty-four cents per hundred. From that time on we made continuous efforts to move these ties. We ordered cars from these roads, and on the Texas & Pacific they furnished four cars, and we loaded the ties into them, but they refused to give us a Bill of Lading as per letter from W. J. Small, Agent at Marthaville, dated November 28, 1907, introduced in evidence. These ties were afterwards sold to the Texas & Pacific Railway Company who were the only people I could sell them to, as we couldn't move them from Marthaville. These cars were requested and loaded for the purpose of carrying out the contract with the Union Pacific Railroad Company to ship these ties to Linwood, Kansas. We sold them to the Texas & Pacific Railway Company at forty-five cents, a loss of five cents a tie on the price we would have received under the contract with the Union Pacific Railroad. There were 1333 of these ties. (Rec. pp. 22-24.)

By the first of October, and during that month, we had accumulated and placed along the line of the

Texas & Pacific Railway Company approximately Twenty-three or Twenty-four Thousand ties, and during the month of November, we took five or six thousand more. When we started to supply the ties to the Union Pacific we made contracts with different men to take their oak ties as long as this contract with the Union Pacific lasted, and after the contract was cancelled, we went back to these men and asked them not to make us take any more ties than they agreed to make us take, and we only took what we were obligated to take from them, and had finally accepted, and allowed it to string along pretty near a year before we took all of them. These contracts were entered into for the purpose of enabling us to accumulate the One Hundred and Fifty Thousand ties to deliver to the Union Pacific under our contract. We agreed to take all the ties these men would produce, and they were to deliver them to us at loading points on the Kansas City Southern and Texas & Pacific Railways. The exact number so accumulated by us along the line of the Texas & Pacific Railway Company under this contract was Forty-four thousand, Five Hundred, Seventy-three (44,573) ties exclusive of those we shipped under the contract, and those four cars sold to the Texas & Pacific. These tie men commenced delivering the ties on the line of the road about the 10th of August, 1907, and continued until the middle of July, 1908. They were ready for delivery before that and would

have been delivered if the contract with the Union Pacific had remained in force. (Rec. pp. 24-25.)

We had ample ties at these stations in October and November to make delivery of Fifteen Thousand ties per month if I had taken them from both lines, and our company had such organization as would enable it to carry out this contract for One Hundred and Fifty Thousand ties according to its terms. We organized on both lines of railroad, and intended to ship Ninety Thousand from the Kansas City Southern and Sixty Thousand from the Texas & Pacific, and if the railroads had furnished the cars and transported the ties as we offered them, we would have carried out our contract to the letter. (Rec. p. 26.)

The Texas & Pacific first refused to move the ties on its line about the latter part of October or the first of November, 1907. It would be hard to state with whom I was dealing when the refusal was made. I wrote to Mr. Andrews for cars on October 15, 1907, as per letter in evidence, and my first intimation that they would not furnish the cars was a letter or telegram dated November 23, 1907, that they would not move them. (See Rec. pp. 26-27-23.)

I repeated this request to Mr. Andrews in a letter dated Novemer 18, 1097. These requests got us four cars at Marthaville. The other cars we got were in response to requests made to the Agent at Cypress and Chopin. After the Agent at Marthaville informed me

that they had no rates and could not move any ties to Linwood, I wrote or telegraphed to Mr. Thorne, General Manager of the road, asking him to have cars placed for loading these ties as per letter dated November 25th, herein copied, requesting sixty-six cars distributed at the stations named, advising him that these cars were "to be loaded with wood, railroad crossties for the Union Pacific Railroad, Linwood, Kansas, these ties were sold for eighty-six cents each delivered on your published lumber tariff now in effect, and represent a profit to us of seventeen cents each. Answer when cars will be placed for loading." On October 10, 1907, I wrote to Mr. E. L. Sargent, General Freight Agent, Texas & Pacific Railway Company, at Dallas, asking advice as to proper person connected with his company to whom we should make requests for cars in which to load railway crossties now on sidings of that road in Louisiana, and advised him that we had about thirty-five carloads which we wished to ship to the Union Pacific Railroad at Linwood, Kansas, and desired to move them as promptly as possible, and would appreciate a reply at his earliest convenience. I have no recollection of receiving an answer from Mr. Sargent. Mr. Thorne replied to our telegram that there was no interstate rates in effect at that time on oak ties, and we must not load equipment until such rates were put in effect. That they had applied to the Interstate Commerce Commission

for authority to put in rates on oak ties, and should receive answer within one week and would promptly acquaint us with their decisions. I never got any information from Mr. Thorne after that that the rate was in, and on December 14th I again wrote him reminding him of our correspondence, and he replied under date of December 17th that his company had made application for authority to put in rates on oak ties, but so far it had not been granted. (Rec. pp. 27-30.)

On September 24, 1907, I wrote to Mr. E. L. Sargent, General Freight Agent, Texas & Pacific Railway, asking advice as to the rate on oak railway crossties from Louisiana points to various points in other states, among them Linwood, Kansas, but never received reply to that letter. We afterwards received letter dated November 25th from C. N. Nesom, Freight Agent, Shreveport, La., enclosing copy of letter from R. C. Andrews, Superintendent, advising that after loading the four cars at Marthaville, they found there was no rate in effect on ties out of the state, and offering to buy them if a reasonable price could be had. (Rec. pp. 31-33.)

Before we proceeded to accumulate these ties, I wrote to Mr. E. L. Sargent, at Dallas, requesting him to furnish me tariff on lumber to various points from various points to which I had no written reply, but sometime afterwards their Commercial Agent at

Shreveport, Mr. H. S. Hinton, delivered me a copy of Texas & Pacific Joint Through Tariff 8500-H, showing rates from points in Louisiana, Texas and Arkansas to various States North and West, including Kansas. (Rec. pp. 38-39.)

Plaintiff here introduced letter dated August 14, 1907, to E. L. Sargent from E. A. Moseley. (Rec. p. 46.)

"Washington, August 14, 1907.

"Mr. E. L. Sargent, General Freight Agent,
Texas & Pacific Railway Co., Dallas, Texas.

"Dear Sir:

"Inclosed herewith find copy of an informal complaint made by the Blocker-Miller Company, of Honey Grove, Texas, alleging unjustly discriminatory rates on red oak, gum, willow, cottonwood and black oak ties from points on the Texas & Pacific Railway in Texas to Kansas City, Missouri, as compared with rates on pine ties and pine lumber from the same points of origin to the same destination.

"Please send the commission such statement in regard to this complaint as you may deem proper.

"Very respectfully,
"J. A. MOSELEY, Secretary."

And the reply thereto by E. L. Sargent, G. F. A. (Rec. pp. 47-48.)

"Mr. E. A. Moseley,
"Secretary Interstate Commerce Commission,
"Washington, D. C.

"Dear Sir:

"I am in receipt of your favor of the 14th inst., inclosing copy of formal complaint made by the Blocker-Miller Company, of Honey Grove, alleging unjustly discriminatory rates on red oak, gum, willow, cottonwood and black oak ties from points on the Texas & Pacific Railway in Texas, to Kansas City, Mo., as compared with the rates on pine ties and pine

lumber from the same points of origin to the same destination.

"I beg to advise that the question of rates on crossties is of a very peculiar nature, owing to the fact that a railroad, to a very large extent, is dependent on the timber adjacent to its right-of-way for its crossties, which, as you know, is a very large part of its expense for maintenace of way, the majority of lines have not considered it sound busines policy to allow a low system of rates to be inaugurated on oak and cypress crossties, thus draining its territory of the commodity in question, believing that a company itself, through its timber contractors, were in a position to pay fair prices as other contractors, that the owners of the timber and the community at large adjacent to the seats of the tie industry, would be as much benefited as to allow outside railroads to come in and buy the supply, thus forcing the above mentioned railroad company to endeavor to get its timber supply on the line of another road which might be called a by-product of saw mills, and which are now almost invariably treated by a creosoting process, and oak and cypress ties which are very seldom treated, and which after a short time for seasoning are placed in the track. **In all cases we have interposed no objection to our saw mills or contractors moving any amount of ties to either state or interstate destinations**, but for the reasons heretofore given you, we have not felt that we should inaugurate a system of low rates on oak and cypress ties and thus deprive our company of the ties along its line for the benefit of some other railroad. There is no sentiment entering into the rate situation on the commodity alluded to, but it is strictly a question of business. I believe that with the explanation, the Commission will understand the position we take, more particularly as it is not to the detriment of the community adjacent to our line owning the timber, the timber contractors getting the timber out or the workmen engaged in the labor. If any one is hurt in the slightest manner it is only the railroads who are endeavoring to drain the supply of timber which is fast becoming depleted, located on the line

of our railroad to conserve their own in the future, with the prospect of an enormous rise in years to come. It is certainly a selfish position for them to take to endeavor to obtain a large share of the fast disappearing wood products on the line of another company, when in the majority of cases there are ample supplies contiguous to their own rails. It seems to me it is not a question of the reasonableness of the rate, but a commercial situation which should appeal to any fair-minded body.

Perhaps I should state that the supply of gum, willow and cottonwood lumber on our line is very small as far as we have been able to learn; at the same time to meet the views of the Honorable Commission, this company would be perfectly agreeable to applying the yellow pine lumber rates on ties of those woods: viz., gum, cottonwood and willow, and if the Commission will indicate that such is their wish, we will accordingly suitably amend our northbound lumber tariff, making the yellow pine lumber rates applying on ties as mentioned, effective on notice as outlined by the Commission.

"Yours truly,

'E. L. SARGENT,

"General Freight Agent."

(Rec. pp. 47-48.)

Plaintiff introduced six way bills covering six cars of oak ties shipped from Fouke, Arkansas, over the Texas & Pacific Railway Company to Ft. Worth, Texas, dated August 8, 1908, and October 4, 16, 17, 17, 18, 1907, respectively. (Rec. pp. 49-53.) Also letter dated October 7th, from F. M. Cockrell, Commissioner Interstate Commerce Commission, to E. L. Sargent, General Freight Agent, Texas & Pacific Railway Company, enclosing copy of letter received from

plaintiff complaining of discrimination and refusal to transport products. (Rec. p. 54.)

MARSHALL testified that the average cost per tie placed along the line of the Texas & Paific Railway in Arkansas and Louisiana was 34.03 cents, and if they had been shipped there would have been an expense of two cents per tie for loading and thirty-six cents for freight, and at the price of eighty-six cents under the contract the profit on firstclass ties would be 13.97 cents, and on No. Two ties 18.80 cents. That it was the intention of this company to get out sixty thousand ties under this contract on the Texas & Pacific Railway. Of this sixty thousand, five per cent or Three Thousand would have been No. Two, and Fifty-seven Thousand No. One. The three cars of ties which were transported by this road, were all No. One, 1033 ties. In addition to those shipped, we put out Forty-four Thousand, Five Hundred and Seventy-three (44,573) ties on the line of the Texas & Pacific Railway, and every one of them would have gone on this contract with the Union Pacific at the profits named if we had been allowed to ship them. These ties were placed along the right-of-way, commencing in August, 1907, and continuing until July, 1908. All of them have been sold except those that are absolutely worthless by exposure to the weather and some that were carried off by floods. We sold these ties for Ten

Thousand, Eight Hundred, Seven and 10-100 ($10,807.10) Dollars, and under our contract would have received for them from the Union Pacific Twenty-one Thousand, Three Hundred, Seventy-nine and 68-100 ($21,379.68) dollars, loss of Ten Thousand, Five Hundred, Seventy-two and 67-100 ($10,572.67) Dollars. The price at which we sold these ties was a fair and reasonable price at the time they were sold. This is the total we were able to realize on these ties. The balance had become worthless. (Rec. pp. 55-57.)

It was not my understanding at the time we made this contract and accumulated the ties, that it was not a settled question that ties were lumber, and that I would have to test the thing out. I conferred with our President, who is a lumber man, and he told me he had moved ties from the saw mill. (Rec. p. 64.)

After he cancelled the contract I took the best care I could of the ties we had along the line of the Texas & Pacific Railway and tried to sell them to someone else and get the highest amount for them we possibly could. We were actively engaged in the tie business and made efforts to sell the ties for whatever we could, and finally sold part of them to the I. & G. N. Railroad and part of them to the Switzer Lumber Company, of Shreveport. (Rec. p. 59.) I have made an estimate of what the expense of taking care of the ties were and for the two years, it was in the neighborhood of Ten Thousand ($10,000) Dollars. I apportion-

ed against those on the Texas & Pacific, Thirty-nine Hundred ($3,900) Dollars. This expense was for the purpose of seeing that they were properly cleared around to keep them from being burned and that they were not carried off by other parties; in other words, guarding and protecting them from fire and depredation. By the first of December, 1907, we had in the neighborhood of Twenty-five Thousand ties along the Texas & Pacific, bought from August to that time and paid for. All the ties we claimed had been paid for at the time of the cancellation of this contract. Most of these ties were hewn, only a few sawed ones. Under our contract they could be either hewn or sawed. The ties we accumulated were for the purpose of being shipped under this contract, and were such ties as specified in that contract. (Rec. pp. 60-63.)

P. H. HEARNE, a witness for the defendant, testified that he is now Agent at Bagwells, Texas, for the Texas & Pacific Railway, and was agent for said railway at Fouke, Arkansas, in the fall of 1907. As such Agent during the fall of 1907 he billed out some four or five cars of ties shipped from Fouke, Arkansas, to Colorado City, Colorado, billing them locally to Ft. Worth. I used my lumber tariff rate which was all I could find, and took it for granted that would cover it, assuming that the Agent at Ft. Worth would refuse my billing if it was not correct. These cars were shipped under our Lumber Tariff applying between Fouke

and Ft. Worth. I have been continuously in the service of the Texas & Pacific Railway Company as Agent for ten years, except one winter, and am familiar with shipments of lumber, having shipped a good deal. Fouke is in a lumber country, and I billed these ties out under the Interstate Lumber Rate. Mr. R. B. Ayers was Superintendent of that division of the road, and also of that part of the line where I am now working. Some time after these ties were shipped I received a letter from Mr. Ayers instructing me not to accept ties for shipment, and then I received a letter from Mr. Sargent. Refreshing my memory from that letter, I used our Interstate rates in which ties were not specifically mentioned. Our tariff No. 10121-H, under the head of Texas State Traffic, mentions crossties as taking the lumber rate, and as this is a lumber tariff, I concluded that the Interstate Lumber Tariff would apply. I was quite familiar with the lumber rates, having handled lots of it. I had Arkansas rates and Interstate rates also under separate tariffs in my office, and used the Interstate Tariff applying on lumber; did not use tariff No. 10121-H. I took it for granted I could send ties under the lumber rate. After this correspondence with Mr. Ayers and Mr. Sargent, I discontinued billing and refused to furnish cars for ties. (Rec. pp. 180-183.)

III.

The main question contended for by the plaintiff

in error is that the Circuit Court had no jurisdiction of this case, and that the matters in controversy must be first determined by the Interstate Commerce Commission under the powers conferred upon it by the Act to Regulate Commerce.

This contention is, in our opinion, based upon a false conception of the questions presented by the record, and the propositions thereunder are not applicable to the case at Bar.

We do not complain of the unreasonableness of the lawful rate, or of any discrimination contained in the tariff, nor of any regulation, or practice. It is an isolated instance of refusing to the Tie Company, the service accorded to everyone else, to use a lawful rate in effect, for which we ask the damages awarded under the Act to Regulate Commerce.

Will it be seriously contended that in such a case the injured party should be deprived of the constitutional right to have a jury pass upon his damages, and that the Courts are shorn of their judicial power?

Every phase of this case, so far as the Commission could pass on it, had been affirmatively settled according to the Tie Company's contention, and the only question left, as we think, is the amount of the damages. No Court before which the case could be filed would or could reach a different conclusion on the un-

disputed facts, and these rulings of the Commission are binding upon all such Courts.

In the case of Reynolds vs. Ry. Co., et al., decided June 13, 1888, by the Interstate Commerce Commission, 1 I. C. C. Rep. 685, it said:

"The classification of railroad ties in a difrerent class from other lumber, thus imposing a higher rate upon ties than upon other lumber: Held, to be an unjust discrimination.

"Held further, that it was not just or reasonable that the defendant railroad company should give a low special rate upon coarse lumber in other forms, to the exclusion of ties.

"Rates established by a common carrier under the influence of a desire to keep upon its own lines a material for which the road itself has use, or to keep the price thereof low for its own advantage, cannot be justified."

In the decision the Commission said:

"The ordinary conflict of interest between the railway and the shipper is here intensified by the fact that the direct interest of the carrier requires the cheapening of the shipper's product. It was candidly admitted by its general superintendent that this consideration influenced the conduct of defendant in fixing its rates upon ties at a time when its interstate rates were not subject to control under a law of Congress. But if this was legal then, it is so no longer. It involves and implies extortion. It is not only repugnant to every man's sense of propriety and justice, but it is directly forbidden and made illegal by the third section of the Act to Regulate Commerce, in that it subjects this particular description of traffic to undue and unreasonable prejudice and disadvantage for the pecuniary benefit of the carrier itself. It is a course of dealing if possible even more obnoxious to the just provisions of the Act than would be a tariff arranged in the same manner for

the purpose of giving a preference to another shipper competing from another direction in the same market."

"Rates established by a common carrier under the influence of a desire to keep upon its line a material for which the road itself has use, or to keep the price thereof low for its own advantage cannot be justified either in morals or in law. Every party who produces such a material is entitled to sell it when he wishes, in the best available market, and the common carrier has no right to prevent his doing so by disproportionate or unreasonable rates."

In Foster Brothers vs. Duluth, S. S. & A. Ry. Co., 14 I. C. C. Reports, 232, decided June, 1908, the Commission **approved the application of lumber rates on ties, when there was no specific rate published to apply on ties.**

On page 235 of this report the Commission states:

"Prior to February 28, 1906, there was no specific rate published to apply on ties from these last mentioned stations. (Ridge and Wilcox.) The rate at that time on lumber was 12 cents per 100 pounds, and this rate was applied on ties.

On page 234 we find the following: "Several of the shipments above referred to, aggregating 160,184 pounds, were made by complainant from Ridge prior to February 28th, 1906, when the established rate on lumber and ties to South Chicago was 12 cents per 100 pounds. All the shipments in question, however, were charged for at the rate of 13 cents per 100 pounds. Complainant is, therefore, entitled to a refund of $16, this amount being excess charged on shipments moving prior to February 28, 1906.

In Pacific Coast Biscuit Company vs. O. R. R. & N. Company, 20 I. C. C. 178-180, the Commission held: That where a specific rate is established on wax-paper, such rate must be applied to all grades and qualities of wax paper, regardless of the use to which it is put.

In N. Y., N. H. & H. R. Co. vs. Interstate Commerce Commission, 200 U. S. 361, the Court say:

"Now, without at all intimating that, as an original question, we would concur in the view expressed and without reviewing the rulings made in those cases and adhered to by that body during the many years which have followed these decisions, we concede that the interpretation given by the Commision in these cases to the act to regulate commerce is now binding, and as restricted to the precise conditions which were passed on in the case referred to, must be applied to all strictly identical cases in the future; at least, until Congress has legislated on the subject. We make this concession because we think that we are constrained to do so, in consequence of the familiar rule that a construction made by a body charged with the enforcement of a statute, which construction has long obtained in practical execution and has been impliedly sanctioned by the re-enactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute. Especially do we think this rule applicable to the case in hand, because of the nature and extent of the authority conferred on the Commission from the beginning concerning the prohibitions of the Act as to rebates, favoritism, and discrimination of all kinds, and particularly in view of the repeated declarations of the Court that an exertion of power by the Commission concerning such matters was entitled to great weight and was not lightly to be interfered with."

In I. C. C. vs. D. L. & W. Ry., 220 U. S. 235, the Court, after deciding that findings of fact made by the

Interstate Commerce Commission in a proceeding for redress for unlawful discrimination in railway rates are not open to review in the Courts, proceed to dispose of the legal question, "that is, the right of a common carrier to make the ownership of goods tendered to him for carriage the test of his duty to receive and carry; or, what is equivalent thereto, the right of the carrier to make the ownership of goods the criterion by which his charge for carriage is to be measured."

That was a case where the carrier refused to apply the lawfully filed carload rates, because the goods were owned by various parties and assembled and offered for shipment by forwarding agents, to take advantage of the difference in carload and less than carload rates.

In the instant case, the refusal to transport plaintiff's ties, viewing the record in the most favorable light for the railway company, was because the ties were made by hand and not at a sawmill, as according to the testimony of Mr. Sargent, General Freight Agent (Rec. pp. 122-123) the railway company during all this time received and transported sawed ties from sawmills under this tariff.

Bearing in mind the "analogous" situation, we reproduce from the opinion of the Court in that case:

"The contention that a carrier, when goods are tendered to him for transportation, can make the mere ownership of the goods the test of the duty to carry, or, what is equivalent, may discriminate in fixing the

charge for carriage, not upon any difference inhering in the goods or in the cost of the service rendered in transporting them, but upon the mere circumstance that the shipper is or is not the real owner of the goods, is so in conflict with the obvious and elementary duty resting upon a carrier, and so destructive of the rights of shippers, as to demonstrate the unsoundness of the proposition by its mere statement. We say this because it is impossible to conceive of any rational theory by which such a right could be justified consistently either with the duty of the carrier to transport or the right of a shipper to demand transportation. This must be, since nothing in the duties of a common carrier by the remotest implication can be held to imply the power to sit in judgment on the title of the prospective shipper who has tendered goods for transportation. In fact, the want of foundation for the assertion of such a power is so obvious that in the argument at bar its existence is not directly contended for as an original proposition, but is deduced by implication from the supposed effect of some of the provisions of the second section of the Act to Regulate Commerce. In substance, the contention is that, as the section forbids a carrier from charging "a greater or less compensation for any services rendered or to be rendered in the transportation of passengers or property * * * * * than it charges, demands, collects, or receives from any other person or persons for doing him or them a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions," authority is to be implied for basing a charge for transportation upon ownership or nonownership of the goods tendered for carriage, upon the theory that such ownership or nonownership is a dissimilar circumstance and condition within the meaning of the section."

"But this argument, in every conceivable aspect, amounts only to saying that a provision of the statute which was plainly intended to prevent inequality and discrimination has resulted in bringing about such conditions. Moreover, the unsoundness of the contention is demonstrated by authority."

"But the proposition rests upon the fallacious assumption that because a carrier has the authority to fix rates, it has the right to discriminate as to those who shall be entitled to avail of them. Moreover, the contention is not open for review, because the legal question of the right of the carrier to consider ownership under the second section having been disposed of, the finding of the Commission that to permit the enforcement of the rule would give rise to preferences and engender discriminations prohibited by the act to regulate commerce embodies a conclusion of fact beyond our competency to re-examine."

In I. C. C. vs. I. C. R. R. Co., 215 U. S. 426, the validity of an order of the Commission regulating distribution of coal cars, to prevent discrimination, was in question and the Court decided that the Commission had the power to make the order directing the railway to desist from certain practices, and also that it had the power to require the carrier to establish regulations for a period of two years, providing for the counting of all cars.

In B. & O. Ry. Co. vs. Pitcairn Coal Co., 215 U. S. 481, suit was brought for mandamus under section ten of the act to regulate commerce to compel furnishing of cars, alleging that regulations of the company were discriminatory and worked unjust preferences. It was shown that on a complaint made to the Commission it had acted upon the regulations and refused to hold them preferential. In deciding the effect to be given to section ten of the act providing for jurisdiction of the U. S. Courts, the Court says:

"It being demonstrable, as we have seen, that to give to section ten the broad meaning which the Court below fixed to it would be to destroy or render inefficacious the remedial purposes of the amendments enacted in 1906, it must follow that such construction cannot be adopted, since to do so would compel us to hold that the wide and far reaching remedies created by the amendments of 1906 were, in effect, destroyed by the narrower remedial processes which had been previously enacted in 1889. This conclusion being in reason impossible, it must follow that, construing the provisions of section ten in the light of and in harmony with the amendments adopted in 1906, the remedy afforded by that section, in the cases which it embraces, must be limited either to the performance of duties which are so plain and so independent of previous administrative action of the Commission as not to require a prerequisite exertion of power by that body, or to compelling the performance of duties which plainly arise from the obligatory force which the statute attaches to the orders of the Commission, rendered within the lawful scope of its authority, until such orders are set aside by the Commission or enjoined by the Courts."

In these cases the Court decided that a claim for reparation must be filed primarily with the Commission, 1, where the published rates are complained of as unreasonable; 2, where a practice or regulation in force is complained of as unjust and discriminatory.

In Lyne vs. Del. L. & W. R. Co., 170 Fed. 847, (1908,) Lanning, District Judge, holds:

"That a shipper may maintain an action at law under the interstate commerce act of Feby. 4, 1887, to recover damages from an interstate railroad company because of the giving of a preference or advanatge to another shipper by permitting him to keep cars on its terminal tracks without payment of the charges fixed by its schedules while denying the same right to plaintiff."

"That two methods of procedure are prescribed for the recovery of damages for violation of this act: One by Section 9, by an action at law; and the other by complaint to the Commission."

The Court quotes from the opinion in the Cotton Oil case, 204 U. S. 426.

In Pennsylvania R. R. Co. vs. The International Coal Mining Co., 230 U. S. 184, 57 L. Ed. 1446, this Court held: That previous action by the Interstate Commerce Commission is not a condition precedent to the maintenance of an action under the Interstate Commerce Act of February 4, 1887, Sec. 8, to recover from a carrier the damage sustained by a shipper who has been charged and who has paid, the lawful published freight rates on Interstate shipments of "free" coal, while lower rates resulting from rebates, have been allowed to other shippers of "contract" coal during the same period, and between the same termini, the published tariffs making no distinction between "Contract" and "Free" coal, but naming one rate for all alike.

We quote from this opinion as follows:

"Under the statute, there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rate with service, and calls for an exercise of the discretion of the administrative and rate-regulating body. For the reasonableness of rates and the permissible discrimination based upon difference in conditions, are not matters of law. So far as the determination depends upon facts, no jurisdiction to pass upon the ad-

ministrative questions involved has been conferred upon the courts. That power has been vested in a single body, so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views of the same facts that might be taken by different tribunals.

None of these considerations, however, operates to defeat the court's jurisdiction in the present case. For even if a difference in rates could be made between free and contract coal, none was made in the only way in which it could have been lawfully done. The published tariffs made no distinction between contract coal and free coal, but named one rate for all alike. That being true, only that single rate could be charged. When collected, it was unlawful, under any pretense or for any cause, however equitable or liberal, to pay a part back to one shipper or to every shipper. The statute required the carrier to abide absolutely by the tariff. It did not permit the company to decide that it had charged too much and then make a corresponding rebate; nor could it claim that it had charged too little, and insist upon a larger sum being paid by the shipper. 24 Stat. at L. 379, No. 2; Chap. 104, U. S. Comp. Stat. 1901, p. 3155; 25 Stat. at L. 855, No. 6, chap. 382, U. S. Comp. Stat. Supp. 1911 p. 1289; Armour Pkg. Co. v. United States, 209 U. S. 56, 83, 52 L. Ed. 681, 695, 28 Sup. Ct. Rept. 428. The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute binding as such upon railroad and shipper alike. If, as a fact, the rates were unreasonable, the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former, the right to apply to the Commission for reparation.

In view of this imperative obligation to charge, collect and retain the sum named in the tariff, there was no call for the exercise of the rate-regulating discretion of the administrative body to decide whether the carrier could make a difference in rates between free and contract coal. For whether it could do so or not, the refund of any part of the tariff rate collected was unlawful. It could not have been legalized by any

proof, nor could the Commission by any order have made it valid. The rebate being unlawful it was a matter where the court, without administrative ruling or reparation order, could apply the fixed law to the established fact that the carrier had charged all shippers the published or tariff rate, and refunded a part to a particular class. This departure from the published tariff was forbidden, and No. 8 (24 Stat. at L. 382, chap. 104 U. S. Comp. Stat. 1901, p. 3159) expressly provided that any carrier doing any act prohibited by the statute should be "liable to the person * * * * injured thereby for the full amount of damages sustained in consequence of any such violation * * * * * together with a reasonable * * * * * attorney's fee."

The Interstate Commerce Commission has construed the act as to the authority conferred to award reparation, and the character of claims within its powers.

In Blume & Company vs. Wells-Fargo & Company, (1909), 15 I. C. C. Rep. 53, cited in Carstens Packing Company vs. Oregon Rr. & Nav. Co., et al., 17 I. C. C. Rep. 125, the Commission having for consideration a claim for damages caused by the failure of an Express Company to make delivery of a car load of fruit at the unloading station designated by the shippers, the latter were unable to take advantage of a high market, but were compelled later to sell at a lower price. In dismissing the action the Commission said: "Is it competent for the Commission to act upon a complaint of this nature and to award damages of this character? We have not so understood our authority under the amended act to Regulate Commerce. The general purpose of this Act, as is fully revealed in its first five sections, was to secure just and reasonable rates; to prohibit unjust and discriminatory rates in the performance by car-

riers of like services under similar conditions and circumstances; to prevent undue and unreasonable preferences; to forbid a higher charge for shorter than for a longer haul in the same direction, the shorter being contained within the longer haul; and to render unlawful all combinations among carriers for the pooling of freights. In a word, as a regulative measure the Act confers upon the Commission **power and authority to enter only with respect to the rates and practices of carriers,** and that this was its general object appears no less clearly from an analysis of the statute itself than from the public discussion that accompanied its enactment."

In Lanning-Harris Coal & Grain Co. vs. St. L. & S. F. Rr. Co., (1909), 15 I. C. C. Rep. 37, the Commission, per Knapp, Chairman, stated: "Whether the Commission has authority to award damages in a case where a carrier collects a greater sum on an interstate shipment than is fixed by its published tariffs, or whether the shipper must seek his remedy in the Courts, presents a question somewhat more difficult. But upon consideration of the various provisions of the Act, it is believed that the question should be resolved in favor of the Commission's authority to make such an order. The Commission is authorized to award reparation to any person or persons found to be damaged by any common carrier subject to the provisions of the Act, for a violation thereof. One of the leading prohibitions of the Act is that against the exaction of an unreasonable rate, and it is well settled that the Commission has authority to award reparation in case of the exaction of an unreasonable rate. As against the carrier its published tariff rate is conclusive of the fact that any higher rate is unreasonable. It seems fairly certain that in cases of the exaction of a rate higher than the published tariff **the shipper may bring his suit in court in the first instance,** but the Act also appears to give the Commission and the Courts concurrent jurisdiction in this respect."

In the case of Woodward & Dickson vs. L. & N. Rr.

Co., et al., (1909) 15 I. C. C. Rep. 170, the Commission said:

"The Commission intervenes in misrouting cases only when, as the result of the failure to obey the shipper's routing instructions, or as a result, without such instructions, of moving a shipment over a route carrying a higher rate than the rate in effect over another route reasonably available, additional transportation charges accrue."

In Pueblo Transportation Association vs. Southern Pacific Co., (1908) 14 I. C. C. Rep. 82, the Commission stated: "The Act to Regulate Commerce authorizes the Commission to condemn an unreasonable rate, to prescribe a rate to be applied in lieu thereof and to award damages under the rate so condemned; but in all proceedings before the Commission, both formal and informal, the essential prerequisite to any award of damages is the condemnation of a rate, rule, or practice as unreasonable and the establishment in lawful tariff publications of the rate, rule, or practice that is made the basis of such award."

In Joynes vs. Penn. Rr. Co., (1909) 17 I. C. C. Rep. 361, the Commission said: "Petitioner, a dealer in fruits and general produce, charges discrimination in that the defendant persistently delayed his shipments of fruit in Pittsburg at the Fifty-fourth street yards where the cars were not accessible to teams and could not be unloaded by him, while at the same time cars of other shippers were promptly placed in position at the unloading platform and were thus given a preferred use of the defandant's terminal facilities, and that by reason of said delay and discrimination petitioner suffered loss through the decay of the fruit and otherwise in the sum of $30,497.70, for which amount he claims reparation: Held, That the Commission is without power under the law to make awards of general damages of that nature."

"In cases of the nature involved in the complaint

the Commission may ascertain whether the discrimination alleged actually occurred or whether the carrier has failed in a duty imposed upon it under any provision of the act as charged in the complaint. But the assessment of any resulting damages, other than damages that may be measured by differences in rates, must be left to be determined by action brought in a court of competent jurisdiction."

"The language of the act being of doubtful interpretation, the Commission, which is a special tribunal of limited powers, ought not to take jurisdiction, but should resolve the doubt in favor of the courts where claims of this nature ordinarily belong.

"Section 15 is the dominating and controlling expression of the real object and meaning of the act in its present form. It makes of the Commission what it was undoubtedly intended to be, namely, a special expert body created for the purpose of dealing with the rates and practices of carriers affecting rates, and not a body to take the place of the courts for the redress of alleged wrongs of the character involved in the complaint."

In Washer Grain Company vs. M. P. Ry. Co., 15 I. C. C. 147-152, the Commission held:

Under Section 8 of the Act the damages therein contemplated and the Attorneys' fees provided for can only be recovered in a suit brought in a court. The Commission has no authority to assess costs or to allow attorneys' fees.

IV.

We respectfully insist that this record shows the tariff in question was intended to and did include crossties as lumber, and the position that it does not is a subterfuge adopted by the railway company after it discovered the scope of operations of the Tie Company

in getting out oak ties on its line for shipment to other lines of railroad; and that the idea of filing amendments was adopted as a means of delay, and not in an effort in good faith to enable it to transport the ties.

The undisputed testimony is that Mr. Petty, who operated a saw mill on this line of road for 20 years, manufactured at his sawmill and shipped under interstate lumber tariffs as much as 100,000 ties a year. (Rec. p. 204.) That J. L. Logan shipped about three cars of ties a month; was engaged in manufacturing and handling mostly railroad and mining timbers. (Rec. p. 188.) All while this tariff was in effect.

Mr. Sargent, General Freight Agent of the Railway Company, testified that during the time in controversy, his road transported sawed ties from sawmills at lumber rates under this tariff, and ever since it has been filed. (1901.) (Rec. p. 122.)

P. H. Hearne, Agent at Fouke, Ark., shipped six cars of oak crossties from his station on interstate lumber tariff in which ties are not specifically mentioned, taking it for granted that tariff would cover them. (Rec. pp. 180-183.) That he had been in the service of that railroad as agent for about ten years, and was familiar with the shipment of lumber; was stationed in a lumber country, and billed these ties out on the interstate lumber rate. (Rec. p. 182.) That after this he received orders from the Superintendent, and then had some correspondence with Mr. Sargent, after which he

discontinued billing and refused to furnish cars. (Rec. pp. 181-182.)

W. J. Small, Agent, Marthaville, furnished four cars and had them loaded with ties for plaintiff, but on Nov. 23, 1907, wrote that he had been notified not to issue any bill of lading for oak ties for Linwood, Kas. (Rec. p. 32.) And again wrote on Nov. 28th, that he was unable to furnish any bill of lading whatever, as the instructions were not to furnish any bill of lading under any circumstances. That he could have furnished cars, but was stopped. (Rec. p. 23.)

R. C. Andrews, Supt., at Marshall, in reply to complaint for not furnishing cars, wrote to the Tie Company, Nov. 18, 1907: "You seem to be under the impression that we do not want to furnish cars for your ties; your business is as good to us as any one's business, but as you (your) ties go to points routed via several other lines, we would not care to furnish Texas & Pacific cars for such shipments, if possible to avoid it. We will probably be able to give you a few cars within the next few days, and will fill all of your orders as soon as possible." (Rec. p. 28.)

In response to Tie Company's letter of Sept. 24th (Rec. p. 31), requesting rate on oak railway crossties, to Mr. Sargent, he had Mr. Hinton, Commercial Agent at Shreveport, to call on the Tie Company and offer to put in a rate of 50 cents per Cwt., to Linwood, Kansas, and 75 cents to points in Minnesota. (Rec. p. 120.)

On Oct. 10, 1907, the Tie Company wrote to Mr. Sargent that they had about 35 carloads of ties to be shipped to Union Pacific Ry., at Linwood, Kansas, and

desired to move them as promptly as possible, but received no reply. (Rec. p. 30.)

On Nov. 25th, the Tie Company telegraphed to Mr. Thorne, General Manager, requesting that cars be placed at certain stations to be loaded with wood railway crossties for Union Pacific Railway, Linwood, Kansas, sold delivered on published lumber tariff rate of 24 cents. (Rec. p. 29.)

The Interstate Commerce Commission wrote to Mr. Sargent, Oct. 7th, enclosing copy of the complaint of Tie Company under date Sept. 30, 1907, to which Mr. Sargent replied under date Oct. 11th, that the situation from their point of view was explained to the Commission in a previous letter dated August 19, 1907. (Rec. pp. 47-48), copy of which is attached for convenient reference. (Rec. p. 100.)

Every railroad man connected with this tariff construed it to include oak railway crossties until the Executive department gave instructions to Mr. Sargent.

The Union Pacific is a party to the tariff, and contracted for 150,000 ties based on the rate named in it.

In the light of this record, we feel justified in saying that the alleged efforts of the General Freight Agent to amend this tariff, to enable his Company to transport these ties under his construction of the tariff, were not in good faith, but the tactics used were designed to delay such shipments, to force a cancellation by the Union Pacific Railroad of the contract.

The letter of Commissioner Cockrell (Rec. p. 106) shows that the Commisioners had become impatient, as he writes: "I hope this will end the many letters we have been receiving in regard to ties."

Mr. Sargent, by his own testimony, was familiar with the rules and decisions of the Interstate Commerce Commission. (Rec. pp. 125-126), and one of its earliest rules is, that an amendment to a tariff on file must mention specifically such tariff, by number. With this knowledge, in December, three months after defendant in error had applied for the rates on ties, the witness sends in a blanket application amending all tariffs filed, or concurred in, by it, without designating them, especially the Joint Through Tariff involved in this action; and on this account the Commission refused the permission to file the amendment (Rec. p. 121), and demanded that the application be made in proper form, under its regulations.

After exhausting all dilatory tactics, the Railway Company on January 13, 1908, prepared and forwarded for filing, the so-called "Amendment" claimed to be necessary, effective February 16, 1908, (Rec. p. 111), five months after the Tie Company had requested advice as to the rate, and sixty days after its action had forced a cancellation of the contract by the Union Pacific Railway! And Counsel for plaintiff in error here complain of the action of the Learned Judge who tried the case below, and contend that the Tie Company's

loss was caused by the illegal act of another Company!!

V.

If the contention of plaintiff in error that joint through tariff 8500-H does not apply to crossties, and that they had no duly published rate under which said ties could be moved be sustained, they have violated Section One of the Act to Regulate Commerce and are therefore liable to the Tie Company for any damages it may have sustained by reason of such violation of the Act.

The pleadings and the undisputed evidence in this record show that the Tie Company made reasonable request for the transportation of the ties under said twenty-four cent rate or at any other rate. That it had the ties at stations along the line of railroad and demanded that same be transported, but the railway company refused to receive them upon the plea that it had no rate of any character under which it could move the traffic.

Section 1 of the Act to Regulate Commerce as amended June 29, 1906, paragraph Two, is as follows:

"And it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto."

In Enterprise Transportation Co. vs. Penn. Rr., 12 I. C. C. Rep. 326, the Commission said:

"But the first section of the Act, as amended June 29, 1906, provides that it shall be the duty of carriers subject to the provisions of the Act 'to establish through routes and just and reasonable rates applicable thereto.' The refusal, therefore, upon the part of carriers to establish and maintain just and reasonable through routes, is, today, of itself a violation of the Act."

VI.

The Court did not err in that portion of its charge to the jury that "the uncontroverted evidence shows that by reason of the defendant's failure and refusal to accept from the plaintiff and transport the ties called for by plaintiff's contract with the Union Pacific Railway Company, the contract of the plaintiff was breached and not fulfilled by the plaintiff." Nor in refusing the special instructions numbered three and six referred to in the Ninth and Tenth errors assigned.

All the testimony upon the cancellation of the contract in the record, is that of J. W. Griffith, a witness for the plaintiff in error, and of J. J. Marshall, abstract of which we copy below.

Evidence as to Cancellation of Contract.

J. J. MARSHALL, testified:

This contract for One Hundred and Fifty Thousand ties with the Union Pacific was cancelled by Mr. Griffith of the Union Pacific Railroad by a letter dated December 17th, as follows:

"American Tie and Timber Company,
"Mr. J. J. Marshall, Manager,
"Shreveport, La.

"Dear Sir:

"Referring to contract with your company, dated July 23, 1907, for 150,000 white oak crossties "delivery to commence on or before October 1, 1907, and continue at the rate of 15,000 ties per month until deliveries are completed," according to my records you have shipped to date, including bills received yesterday, 7,336 ties, which, as you know, is not a specific fulfillment of the contract and the contract is void on that account.

"Since that contract was made we have received hundreds of thousands of crossties on other contracts, and now have on hand our entire requirements of crossties for the year 1908. This letter is to notify you that we do not require the ties remaining due on your contract, and that we are unable to accept same and you are requested to discontinue shipments.

"Yours truly,
"J. W. GRIFFITH,
"Purchasing Agent."

In December I went to Omaha and called on Mr. Griffith in his office regarding the ties and requested that he extend the contract and give me time to get the rate situation straightened out and make shipment; and he reached in his desk and got this letter and handed it to me. (Rec. p. 74.) I cannot be positive about the date I was at Omaha; when I went there, I had not received notice of cancellation of the contract. Mr. Griffith showed this letter to me and then mailed it to me. I made such efforts as a business man would make to get him to rescind this action of cancellation and permit me to ship the ties under our

contract. The first intimation I had of the cancellation of the contract by the Union Pacific was this personal interview with Mr. Griffith in Omaha in December, 1907. During that conversation he handed me this letter, which I read, and I did everything in my power to get him to rescind the letter and let me ship what ties we had. He said that he couldn't do it, that it was beyond his power to do it. (Rec. pp. 75-76.)

In the conversation with Mr. Griffith at Omaha, I communicated to him that application had been made for rates and I would soon be able to begin moving them. (Rec. p. 87.) As to whether or not the Union Pacific was kept advised about our trouble to move the ties, they had an inspector looking after the ties and he knew we were not able to ship out the ties on account of the trouble we were having with the rates. (Rec. p. 96.) I am not positive, believe that the first time I ever saw Mr. Griffith was this trip to Omaha about December 20th. After he showed me his letter cancelling the contract and refused to rescind the cancellation, I got him to agree to take about twenty carloads of ties we had already loaded and he agreed to take those already loaded and that would be loaded until I could stop my men. He took them at the same rates named in the contract, but the contract was cancelled. (Rec. pp. 98-100-291.)

J. W. GRIFFITH, witness for defendant, testified that he is Purchasing Agent for the Union Pa-

cific Railroad Company and made the contract of July 23, 1907, with the American Tie and Timber Company. That as such Agent he wrote the letter of December 17th cancelling the contract to the American Tie and Timber Company. That this letter gives the reason for cancelling the contract. From a notation on this letter I see that Mr. Marshall, representing the Tie Company, called on me and interviewed me on that date, but I am unable to state the substance of the conversation. It is a fact that I cancelled the contract above referred to because of the failure of the plaintiff in this case to ship fifteen thousand ties per month, as called for by the contract.

Authorities.

Beach Modern Law of Contracts, Vol. 1, Section 122.

Norrington vs. Wright, 115 U. S. 188.

VII.

Plaintiff in error seems to thinks that there is some special meaning to the word commodity as applied to a commodity rate. It also seems to have found great comfort in a clause in the ruling of the Interstate Commerce Commission that "commodity rates must be specific and must not be applied to analogous articles." We have been unable to find any definition of "analogous" that justifies a contention that an article which is lumber could by any process of reasoning be called an "analogous article."

In Indianapolis Freight Bureau vs. C. C. C. & St. L. Rr. Co., (1909) 15 I. C. C. Rep. 367, the Commission said: "Commodity rates are usually, if not invariably lower than the class rates, being special rates presumably established on account of peculiar circumstances and conditions."

"They are usually made upon coarse, cheap articles which are not of sufficient value to bear the numbered class rates. For example, they are made on iron articles, brick, lumber, clay, cement, stone, salt, coal, etc." New York Board of Trade & Transp. vs. Pa. Rd. Co., (1891) 3 I. C. C. Rep. 417.

VIII.

In view of the record in this case the charges of the court that if the jury "believe from the evidence that oak railway ties are lumber within the meaning and usage of the lumber and railroad business," and its refusal to give the special charges requested by defendant in the same general terms, cannot be complained of by the plaintiff in error as the charge given by the court is more liberal to it than justified by the law, and those requested are erroneous. We respectfully submit that under the testimony in this case the lower court should have instructed the jury that ties are lumber.

IX.

The Court did not err in refusing to permit the introduction of the correspondence between E. L. Sargent and P. H. Hearne complained of in the Seventh error assigned; because said letters are exparte statements, self serving and not binding upon the plaintiff.

Besides, both these parties were present in Court and placed upon the stand as witnesses.

X.

The Court did not err in affirming the judgment of the Circuit Court, awarding the defendant in error the sum of Twenty Five Hundred Dollars $2500) Attorneys' fees, and under the law this item is fixed by the Court and not submitted to the Jury.

While it is **aliunde** the record, we do not think it improper to say that the Trial Judge heard testimony upon what would be a reasonable allowance for Attorneys' fees.

We did not notice heretofore that the record does not show the testimony before the Judge as to the amount of Attorneys' fees, but, in our opinion, the question of whether or not the Court should hear testimony is a matter in his discretion. We assume that the Trial Judge is as able to pass upon this matter without testimony as with it.

The Circuit Court of Appeals in this cause say that "the amount allowed for Counsel fees in this case appears to be reasonable, in the light of the record and our judicial knowledge of the services rendered. (Rec. p. 239.)

The brief of the plaintiff in error, filed in this court, is the first time the question has been raised as

to whether or not the Court, without evidence, is authorized to fix the amount of such fees.

The Twentieth Assignment of Error in the Circuit Court of Appeals (Rec. p. 235) attacks the amount allowed as Attorneys' fees because, (a) same were not properly recoverable by plaintiff in this case; and (b) because the amount allowed is excessive.

Authorities.

W. W. Montague & Co. vs. Lowry, 193 U. S. 38.

XI.

The verdict of the jury is not excessive in amount and the Court did not err in refusing to reduce the amount of damages awarded by the Jury.

The pleadings allege a loss of $10,572.67 on the 44,451 ties placed along the line of the road which were refused shipment, and a loss of 13.27 cents on Number One and 18.80c on Number Two Ties, on the 14,429 Ties which would have been gotten out under this contract.

The testimony upon these points is undisputed, except that it shows 44,573 ties placed on the road and a profit of 13.97c per tie on the No. 1 ties; showing that the 13.27c in the pleading was a clerical error. However, the jury, in finding its verdict, allowed only 13.2569c per tie on all of these, without taking into consideration that five per cent of them would bring the plaintiffs a profit of 18.80c per tie.

The proof is also undisputed as to the item of $3900.00, expense of taking care of the ties, and the matter of interest is simply a calculation.

Under the pleadings and evidence, the Jury were authorized to find a verdict in favor of the Tie Company, for $16,427.35, exclusive of interest, and if any complaint is made of the amount of the verdict, it should come from the Tie Company and not the plaintif in error.

On the hearing of the Motion for a New Trial, in the court below, we had the figures used by the Jury in arriving at their verdict and the learned Judge who tried the case overruled the contention that the verdict was excessive, and such action is not reviewable.

We respectfully pray that the judgment of the Circuit Court of Appeals be affirmed.

ROLLIN W. RODGERS,
Texarkana, Texas,
Attorney for Defendant in Error,
American Tie & Timber Company, Ltd.

TEXAS & PACIFIC RAILWAY COMPANY *v.* AMERICAN TIE & TIMBER CO., LTD.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 180. Argued January 20, 21, 1914.—Decided June 8, 1914.

Whether a class tariff includes a particular commodity is a controversy primarily to be determined by the Interstate Commerce Commission in the exercise of its power concerning tariffs and the authority to regulate conferred upon it by the Act to Regulate Commerce.

The courts may not, as an original question, exert authority over subjects which primarily come within the jurisdiction of the Interstate Commerce Commission.

Whether crossties are or are not lumber and therefore within the tariffs filed for the latter is a question on which there is great diversity of opinion even among experts upon the subject, and one that should be determined in the first instance by the Interstate Commerce Commission.

190 Fed. Rep. 1022, reversed.

THE facts, which involve the jurisdiction of the Federal courts of cases to recover damages against a railway company for refusing to accept interstate shipments without action first taken thereon by the Interstate Commerce Commission, are stated in the opinion.

Mr. Hiram Glass, with whom *Mr. W. L. Hall* was on the brief, for plaintiff in error:

The Circuit Court did not have power to determine the issues and grant the relief prayed for under the facts disclosed by the record.

The trial court should have instructed a verdict for the plaintiff in error.

The damages of defendant in error caused by its consent

to the wrongful cancellation of the contract by the Union Pacific Railway Company are not recoverable.

The verdict of the jury and the judgment of the court awarded greater damages than sued for.

In support of these contentions, see § 6, Interstate Commerce Act, June 29, 1906; *Balt. & Ohio R. R.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Tex. & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Int. Com. Comm.* v. *Illinois Cent. Ry. Co.*, 215 U. S. 452; *Morrisdale Coal Co.* v. *Penn. R. R. Co.*, 230 U. S. 304; *Mitchell Coal Co.* v. *Penn. R. R.*, 230 U. S. 247; *Southern Railway* v. *Reid*, 222 U. S. 424; *Atl. Coast Line* v. *Macon Grocery Co.*, 166 Fed. Rep. 206; *Smith* v. *Detroit &c. Ry.*, 175 Fed. Rep. 506; *C. I. & S. Co.* v. *K. & M. Ry.*, 178 Fed. Rep. 261; *Franklin* v. *Penn. R. R. Co.*, 203 Fed. Rep. 134; *Pacific Coast B. Co.* v. *Railroad*, 20 I. C. C. 546; *United States* v. *Ill. Terminal Ry. Co.*, 168 Fed. Rep. 548; *So. Pac. Ry. Co.* v. *Int. Com. Comm.*, 200 U. S. 552; *Howard Supply Co.* v. *C. & O. R. R.*, 162 Fed. Rep. 188; *Greason* v. *St. L., I. M. & S. Ry. Co.*, 86 S. W. Rep. 722; *Armour Packing Co.* v. *United States*, 209 U. S. 56; *Mugg* v. *T. & P. Ry. Co.*, 202 U. S. 242; *McDonald* v. *K. C. B. & N. Co.*, 149 Fed. Rep. 360; *Beck* v. *Pauli*, 52 Fed. Rep. 700; *Shouse* v. *Doane*, 21 So. Rep. 807; *Lapsley* v. *Howard*, 119 Missouri, 489.

Mr. Rollin W. Rodgers, with whom *Mr. R. P. Dorough* was on the brief, for defendant in error:

Having in effect a joint through lumber tariff, covering "lumber, all kinds," a carrier must transport all articles offered embraced in the broad meaning of the term lumber.

The competent evidence required on which to base an instruction to the jury that plaintiff in error had a lawful rate in effect to transport ties was offered by defendant in error.

The tariff in effect when filed was intended to cover ties and the contention now set up is a subterfuge.

The defendant in error is entitled to recover in this cause under § 1 of the Act to Regulate Commerce.

The charge of the court on cancellation of contract was proper under the evidence.

Sections 1, 3, 6, 8, and 9, of the Act to Regulate Commerce, 24 Stat. 379, 34 Stat. 584, apply to this case.

In support of these contentions, see *Am. T. & T. Co.* v. *K. C. S. Ry. Co.*, 175 Fed. Rep. 28; *Balt. & Ohio Ry. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *C., B. & Q. Ry.* v. *Feintuch*, 191 Fed. Rep. 488; *Int. Com. Comm.* v. *D., L. & W. Ry.*, 220 U. S. 235; *Int. Com. Comm.* v. *I. C. R. R. Co.*, 215 U. S. 426; *Lyne* v. *D., L. & W. Ry.*, 170 Fed. Rep. 847; *Montague* v. *Lowry*, 193 U. S. 38; *Norrington* v. *Wright*, 115 U. S. 188; *N. Y., N. H. & H. Ry. Co.* v. *Int. Com. Comm.*, 200 U. S. 361; *Penn. R. R. Co.* v. *Int. Coal Co.*, 230 U. S. 184; 1 Beach Modern Law of Contracts, § 122. See also the following cases decided by the Interstate Commerce Commission. *Blume* v. *Wells-Fargo & Co.*, 15 I. C. C. 53; *Enterprise Trans. Co.* v. *Penn. R. R.*, 12 I. C. C. 326; *Foster Bros.* v. *Duluth S. S. & A. Ry.*, 14 I. C. C. 232; *Hurlburt* v. *L. S. & M. S. Ry.*, 2 I. C. C. 122; *S. C.*, 22 *Id.* 81; *Ind. Frt. Bureau* v. *C., C., C. & St. L. Ry.*, 15 I. C. C. 367; *Joynes* v. *Penn. R. R. Co.*, 17 I. C. C. 361; *Lanning-Harris Co.* v. *St. L. & S. F. Ry.*, 15 I. C. C. 37; *Newton Gum Co.* v. *C., B. & Q. Ry.*, 16 I. C. C. 341; *N. Y. Board of Trade* v. *Pa. R. R.*, 3 I. C. C. 417; *Pitts* v. *St. L. & S. F. Ry.*, 10 I. C. C. 684; *Pac. Coast Biscuit Co.* v. *O. R. & N. Co.*, 20 I. C. C. 178; *Pueblo Trans. Assn.* v. *So. Pac. Ry.*, 14 I. C. C. 82; *Reynolds* v. *Railway Co.*, 1 I. C. C. 685; *Woodward* v. *Louis. & Nash. Ry. Co.*, 15 I. C. C. 170; *Washer Grain Co.* v. *Mo. Pac. Ry.*, 15 I. C. C. 147.

Mr. Chief Justice White delivered the opinion of the court.

Basing its cause of action on the Act to Regulate Commerce the American Tie & Timber Company, defendant

in error, hereafter called the Tie Company, commenced suits in the Circuit Court of the United States for the Northern District of Texas against the Texas & Pacific Railway Company, plaintiff in error, and the Kansas City Southern Railway Company to recover damages alleged to have resulted from the refusal of the railway companies to furnish, in September, October and November, 1907, cars for the loading of oak railway crossties at various points on the line of the railways in Arkansas and Louisiana for shipment to Linwood, Kansas, beyond the lines of the companies. The cases were consolidated for trial, subject to a plea to the jurisdiction filed by the Kansas City Southern Railway Company, which plea was afterward sustained and the suit as to that company dismissed. There was a trial, however, as to the Texas & Pacific Railway Company, resulting in a verdict and judgment thereon for $17,112.33, and the writ of error now before us is prosecuted by the Railway Company to a judgment of the court below affirming the trial court. (190 Fed. Rep. 1022.)

At the close of the evidence a motion was made to dismiss "because under the facts and circumstances now disclosed by the record, and compatibly with the act of Congress of the United States to regulate interstate commerce, this court has no power to consider and decide the subject matters which are complained of, or to award the relief prayed for by plaintiff." The denial of this motion is assigned as error and we come at once to consider it and state only so much of the pleadings and evidence as is necessary to adequately present the issue to be decided.

The amended petition after averring that the Tie Company was a Louisiana corporation and that the Railway Company was a corporation organized under the laws of the United States, alleged in substance that in 1901 the Railway Company issued and filed with the Interstate Commerce Commission "its joint through lumber tariff, T. & P. No. 8500–H, applying on lumber, all kinds (except

Walnut and Cherry), lath and shingles and articles taking same rates from points on the Texas & Pacific Railway Co. to points in Kansas," by which a joint through rate of twenty-four cents per hundred pounds was put into effect from points on the Railway Company's line in Arkansas and Louisiana to Linwood, Kansas, "on, amongst other things, oak lumber," which rate it was averred had been continuously in effect from the date of the filing of the said tariff up to the happening of the events complained of.

It was averred that on July 23, 1907, the Tie Company entered into a contract with the Union Pacific Railway Company to deliver to said company f. o. b. cars Linwood, Kansas, 150,000 oak railway crossties of specified dimensions at the rate of fifteen thousand per month, beginning on or before October 1, 1907, at the price of 86 cents per tie, which contract was by its terms based on the rate of 24 cents per hundredweight fixed in the tariff filed as above stated in 1901. That for the purpose of performing said contract the Tie Company accumulated at stations on the Railway Company's line in Arkansas and Louisiana 44,541 oak crossties for shipment to Linwood, Kansas, and on October 10, 1907, requested the railway to furnish cars for the loading of the crossties at such points. It was alleged that after furnishing three cars, which were loaded by the Railway Company and shipped at the rate of 24 cents per hundred pounds, the Railway Company refused to provide further cars or to receive the crossties for shipment upon the ground, as stated by it, that it had no through rate applicable to oak railway crossties from the several points on its line to Linwood, Kansas. The petition charged, however, that the joint through lumber tariff above referred to and the rate of 24 cents thereby established included oak ties and that the railway's refusal to provide cars and to carry the ties at its published rate was an unjust and unreasonable discrimination against the Tie Company, against the several places on the Railway

Company's line where the ties had been accumulated and against the ties as an article of commerce, which discrimination, it was averred, was practiced by the Railway Company with the object of preventing the movement of the crossties to points beyond its line and of thus compelling the Tie Company to sell the ties which it had accumulated to the Railway Company. It was alleged that the refusal to transport the ties had resulted in unreasonable prejudice and disadvantage to the Tie Company and to the traffic in ties, and in benefit to the Railway Company as a purchaser and consumer of crossties, all of which constituted a violation of the Act to Regulate Commerce. It was averred that in consequence of the refusal of the Railway to furnish the cars and the resulting inability of the Tie Company to deliver the ties to the Union Pacific Railway under the contract, that company had cancelled the contract to buy the ties. And the amount sought to be recovered was alleged to be the loss resulting to the Tie Company consequent on such cancellation, together with punitive damages based on the "wilful, wanton and malicious" conduct on the part of the Railway Company, and a reasonable attorney's fee.

The Railway Company besides denying generally the allegations of the amended petition alleged that its joint through lumber tariff did not include a rate on oak railway crossties, but that crossties were a separate and distinct and well-recognized freight commodity, and that at the time mentioned in the petition it had not filed with the Interstate Commerce Commission any tariff under which it could lawfully accept for interstate shipment, at a through rate, the crossties offered by the Tie Company. The answer further denied that its failure to have in effect such a rate was a discrimination against crossties or the Tie Company or any locality, and alleged that oak crossties had never before been offered to it in Arkansas and Louisiana for shipment to interstate points on its lines or

connections so as to render it advisable to establish such a rate. It was averred that when the Railway Company first learned, in September, 1907, of the purpose of the Tie Company to ship crossties it at once notified the Tie Company that it had no through rate on ties and therefore would not be able to offer such a rate but would seek to establish a through rate of fifty cents per hundredweight if sufficient time was allowed it to give the public notices of the filing of the tariff as required by the statute. It was then alleged that thereafter the first intimation that the Railway Company had of the purposes of the Tie Company was a letter transmitted to one of its officers from the Interstate Commerce Commission informing the Railway Company of the fact that the Tie Company had filed an informal complaint with the Commission on the ground that although the Railway Company's tariff on lumber embraced crossties, it had announced its intention not to receive them under the lumber schedule, and protesting in advance against permitting the Railway Company to file a specific tariff on crossties at fifty cents per hundredweight, because, as compared with the 24 cent lumber rate, it would be unreasonable. That at once to avoid difficulty the Railway Company applied to the Interstate Commerce Commission to be allowed immediately to put into effect a cross-tie rate at 24 cents per hundred pounds, the same as the lumber rate, and such request was refused by the Commission. Request was then made to put in such a rate after five days' notice, which was likewise refused, and thereupon in January, 1908, the Railway Company issued and filed with the Interstate Commerce Commission a joint through lumber tariff amended so as to include at the lumber rate "wood railroad crossties, all kinds, car loads." The answer then charged that at no time until such tariff became effective, February 13, 1908, could the Railway Company have lawfully accepted and carried oak railway crossties under the provisions of the

Act to Regulate Commerce. Referring to an averment in the petition concerning the acceptance of three cars of crossties at about this time for shipment at the lumber rate, the answer averred that if the facts were true it furnished no basis for recovery, as the receipt of the ties inadvertently or otherwise in the absence of a rate would have been a violation of law and afforded no ground for inferring the obligation to continue to do so, and besides did not aid the plaintiff's case, which was based upon the refusal of the Railway Company to take freight at an established and existing rate, not upon any supposed obligation by estoppel to do so when there was no established rate. And by an amendment to the answer it was insisted that under § 9 of the Act to Regulate Commerce the plaintiff could not prosecute its action because by making a complaint, as it had done, to the Interstate Commerce Commission concerning the failure to treat the lumber tariff as embracing a rate on crossties, the plaintiff had elected to proceed before the Commission.

The evidence at the trial tended to support the allegations of the amended petition as to the making of the contract with the Union Pacific Railway Company, the accumulation of crossties at the several stations on the Railway's line, the request for cars for the shipment of the ties to Linwood, Kansas, the refusal of the Railway to provide the cars, the cancellation of the contract by the Union Pacific Railway Company, and the consequent loss to the Tie Company. The Railway Company's joint through lumber tariff was introduced in evidence and it was not disputed that by it a rate of 24 cents per 100 pounds was established on oak lumber and that oak railway crossties were not specifically mentioned. The Railway Company also introduced in evidence the correspondence between it and the Interstate Commerce Commission showing among other things the request to be allowed to put immediately into effect the cross-tie rate and the refusal of the

Commission to grant the request, and the other facts and circumstances stated in the answer. It is not disputable that the pivotal question in the case was whether oak railway crossties were included in the filed tariff fixing a through lumber rate of 24 cents per hundredweight, and so far as the solution of that inquiry depended upon the views of men engaged in the lumber and railroad business as developed in the testimony it is equally indisputable that there was an irreconcilable conflict. And this conflict at once leads to a consideration of the principle which dominates the controversy and upon which its decision therefore depends.

There is no room for controversy that the law required a tariff and therefore if there was no tariff on crossties, the making and filing of such tariff conformably to the statute was essential. And it is equally clear that the controversy as to whether the lumber tariff included crossties was one primarily to be determined by the Commission in the exercise of its power concerning tariffs and the authority to regulate conferred upon it by the statute. Indeed, we think it is indisputable that that subject is directly controlled by the authorities which establish that for the preservation of the uniformity which it was the purpose of the Act to Regulate Commerce to secure, the courts may not as an original question exert authority over subjects which primarily come with the jurisdiction of the Commission. *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Balt. & Ohio R. Co.* v. *United States ex rel. Pitcairn Coal Co.*, 215 U. S. 481; *Robinson* v. *Baltimore & O. R. Co.*, 222 U. S. 506; *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 247; *Morrisdale Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 304. No question is made as to the controlling effect of the doctrine as a general rule, but it is urged that it is not applicable to this case for the following reasons:

(a) The foundation upon which the doctrine rests, it is

insisted, is the necessity of a uniform enforcement of the Interstate Commerce Act and the danger of diversity and conflict arising if questions concerning the existence of tariffs or their reasonableness, of discriminations and preferences were left to be originally determined by courts of general jurisdiction, thus giving rise to the possibility of one rule in one jurisdiction and another in another. But the argument proceeds to insist that upon the principle that where the reason for the application of a law ceases to exist the law itself ceases to apply, the settled construction of the Act to Regulate Commerce, announced and enforced in the *Abilene* and other cases, has here no application because it is so plain that oak crossties were included in the lumber rate as fixed in the tariff of the Railway Company that there is no reason for proceeding primarily before the Commission, as there is no possibility of difference on the subject if left to the consideration of the courts. We need not pause to point out the palpable error of law which the proposition involves since on the face of the record it is apparent that the assumption of fact upon which it rests is absolutely without foundation. We say this because nothing could more clearly demonstrate such result than does the conflict and confusion in the testimony concerning whether crossties were included in the filed lumber tariff. And indeed the same demonstration arises from a consideration of some decided cases, as, for instance, *American Tie & Timber Company* v. *Kansas City So. Ry. Co. et al.*, 175 Fed. Rep. 28, 33, presumably a report of this case, where it appears that at the first hearing the trial judge was so clearly of the opinion that crossties were not lumber that he so charged the jury and directed a verdict for the Railroad Company. See also *Greason* v. *St. Louis &c. R. Co.*, 112 Mo. App. 116, where it is apparent that the same conclusion was reached.

(b) Because the question has been determined by the Interstate Commerce Commission in *Reynolds* v. *Railway*

Co., 1 I. C. C. Rep. 600, 685. An examination of that report, however, discloses that the railway had in effect a published rate on crossties *eo nomine* and the complaint was that it was unreasonable because it was higher than the rate on lumber. The ruling of the Commission was not that the lumber rate included a rate on ties, but that the rate on ties was unreasonable as compared with the lumber rate and should be reduced.

(c) Because the Railway Company by loading and carrying the three cars of ties under the 24-cent rate had itself recognized the applicability of the lumber rate to crossties and was concluded thereby. But without stopping to consider the tendency of the proof establishing the want of foundation for the proposition we think it is wanting in merit for this obvious reason: If, as we have seen, the question of whether crossties were embraced in the filed tariff concerning lumber was involved in such conflict and doubt as to require the action of the Interstate Commerce Commission, the situation was such that the Railway Company could not do by indirection that which the statute permitted it to do only by compliance with the law, that is, filing its tariffs in the regular way. Nothing could better serve to demonstrate this self-evident truth than by recurring to the fact that at the very inception of the controversy the request made by the Railway Company to the Interstate Commerce Commission to be allowed to immediately put in the rate on crossties was refused by that body.

(d) Because the Railway Company did not refuse to transport the ties in good faith and insisted upon the absence of a scheduled rate simply as a pretext and device for preventing the shipment of the ties and their delivery in performance of the contract with the Union Pacific Railway, and with the ulterior and wrongful motive of keeping the ties on its line so as to be able to purchase them itself from the Tie Company. But without pausing

to do more than direct attention to the fact that this proposition is necessarily disposed of by what we have said, that is, by the lawfulness, in view of the state of the existing and filed tariff, of the refusal until the Commission had acted, we think all the contentions under this last head are completely answered by the statement that the suit was based upon the unlawfulness of the action of the Railway Company in refusing to carry the ties in view of the filed tariffs, and therefore the contentions are not open for our consideration.

It results that error was committed by the court in declining to sustain the motion to dismiss for want of jurisdiction and therefore it is our duty to reverse.

Reversed.

MR. JUSTICE PITNEY dissents.